138-617
138-617

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 149.

THE TROY LAUNDRY MACHINERY COMPANY (LIMITED), PLAINTIFF IN ERROR,

vs.

ALEXANDER M. DOLPH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1887.

rents and revenues, for the claims evidenced by these judgments were in every instance transferred in full by the various defendants to Mrs. Gaines with power to proceed to enforce payment. The money payments if not expressly appropriated to attorneys' fees, costs of clerk, masters, marshals and other officers, etc., as in the Slawson case, were in effect part of the consideration paid to Mrs. Gaines for property surrendered by her; the case of Hernandez will explain this; the judgment against him for rents and revenues is for $6657.63 with interest, p. 497; in the compromise with him he pays Mrs. Gaines $2500 and transfers to her all his rights and warranty against the city, in consideration of which Mrs. Gaines conveys to him the property described in the compromise, which she had recovered in suit No. 3663, p. 737-8.

It is evident this payment of $2500 cash and the claim of Hernandez against the city as his warrantor together constituted the consideration given to Mrs. Gaines as the price of the land conveyed by her to Hernandez. So it was in all other cases, however in different the verbiage may be. All the while she expected the city as principal debtor to pay the judgments for rents and revenues recovered by her against the possessors of the property.

In the Bauduc case there was no compromise at all; Mrs. Gaines merely sold to Bauduc the property described in the act, pp. 771-2. There is no mention made of the judgment for rents and revenues, and therefore it did not form part of the transaction. The decree against him was for $2500 for rents and revenues. P. 499.

Respectfully submitted,

THOS. J. SEMMES,
ALFRED GOLDTHWAITE,
Of Counsel for the Administrator of Myra Clark Gaines.

138-617
138-617

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 149.

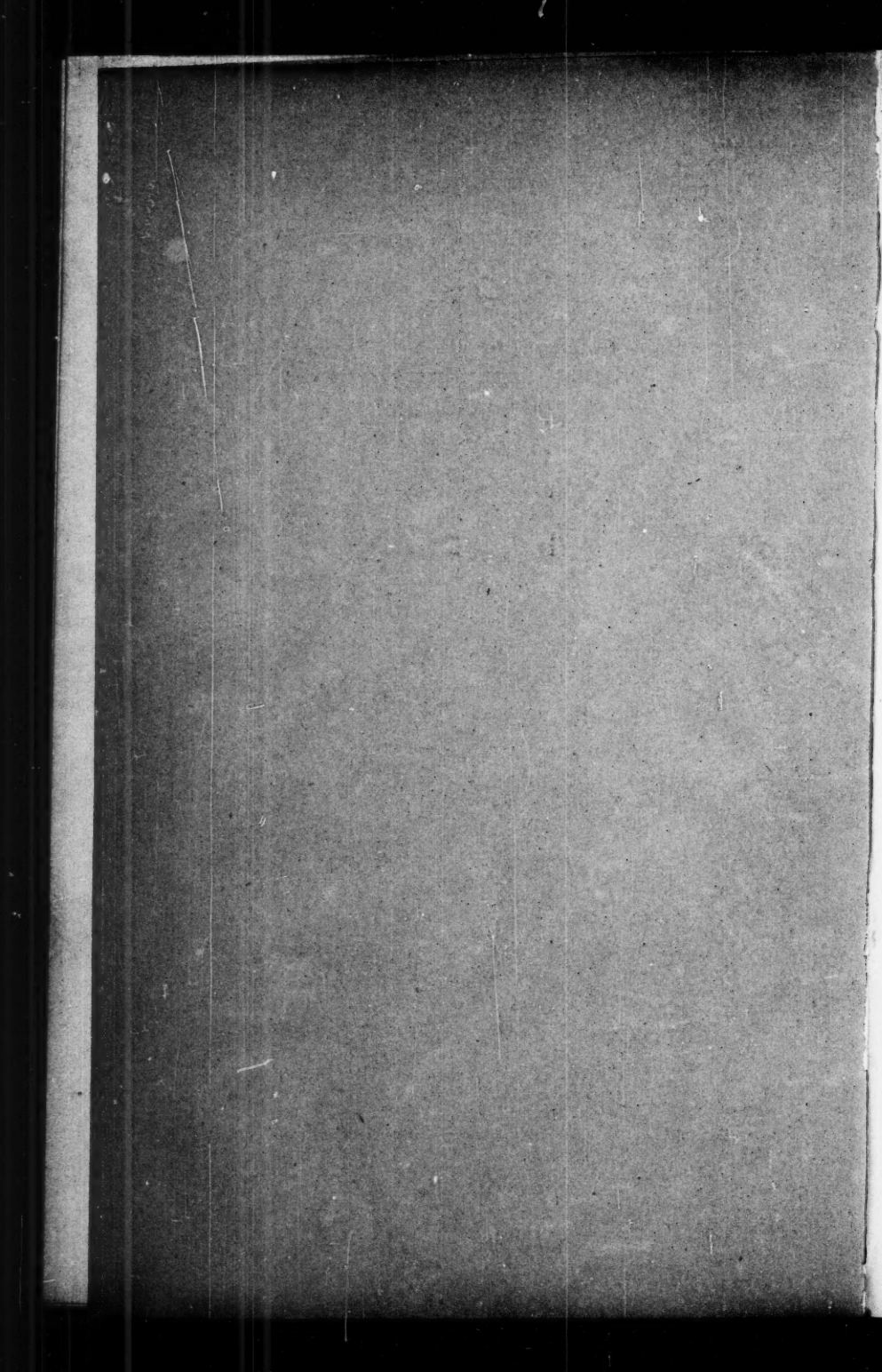
THE TROY LAUNDRY MACHINERY COMPANY (LIMITED),
PLAINTIFF IN ERROR,

vs.

ALEXANDER M. DOLPH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1887.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 149.

THE TROY LAUNDRY MACHINERY COMPANY (LIMITED), PLAINTIFF IN ERROR,

vs.

ALEXANDER M. DOLPH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Summons	1	1
Petition	2	1
Consent to substitution of attorneys	10	5
Order for substitution of attorneys	11	6
Answer	12	6
Minutes of first trial	17	8
Motion for new trial	20	9
Minutes of second trial	21	10
Judgment	25	12
Bill of exceptions	27	12
Testimony of Alexander M. Dolph	27	12
Exhibit 1—Agreement between A. M. Dolph and Troy Laundry Machinery Company (Limited), January 3, 1882	28	13
Exhibit 2—Statement of washing machines sold during the year ending December 31, 1882, by Troy Laundry Machinery Company (Limited), &c.	33	15
Exhibit 3—Letter of The Troy Laundry Machinery Company to A. M. Dolph, February 28, 1883	34	16
Exhibit 3 A—Statement of washing machines sold during year ending December 31, 1882, by A. M. Dolph, &c.	37	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1890.

	Original.	Print.
Exhibit 4—Letter of Delevan Peck, president, to A. M. Dolph, March 1, 1883	42	21
Exhibit 5—Letter of Delevan Peck, president, to A. M. Dolph, January 18, 1883	44	22
Testimony of Charles Angus	60	31
George W. Gordon	71	38
Alexander M. Dolph (recalled)	79	42
Motion for verdict for defendant	84	46
Charge to the jury	86	46
Defendant's requests to charge	95	51
Exceptions to charge	99	54
Agreement as to bill of exceptions	100	54
Judge's certificate	101	55
Opinion of Judge Wallace granting new trial	102	55
Writ of error	111	60
Bond	113	60
Citation and acceptance of service of same	116	62
Clerk's certificate	117	62
Assignment of errors	118	62
Joinder in error	124	65

1 *Summons.*

United States Circuit Court for the Northern District of New York.

ALEXANDER M. DOLPH, Plaintiff,
against
THE TROY LAUNDRY MACHINERY CO., Limited, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of the service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of Utica, this [L. S.] 28th day of February, in the year one thousand eight hundred and eighty-four.

W. S. DOOLITTLE, *Clerk.*

STEDMAN & SHEPARD,
Plaintiff's Attorneys, Office and Post-Office Address. 443 *Broadway, Albany, New York.*

2 *Complaint.*

Circuit Court of the United States for the Circuit and District of Northern New York.

ALEXANDER M. DOLPH, Plaintiff,
vs.
THE TROY LAUNDRY MACHINERY COMPANY (Limited), Defendant. } No. 2520. Petition.

DISTRICT OF NORTHERN NEW YORK, *ss:*

Alexander M. Dolph, who is a citizen of the city of Cincinnati, in the State of Ohio, complains of the Troy Laundry Machinery Company (Limited), which is a corporation duly created and organized under and by virtue of the laws of the State of New York and which has its principal place of business in the city of Troy, in the State of New York and in the northern district thereof, for that, on or about the 3rd day of January, 1882, the said defendant duly made and entered into with this plaintiff a certain contract, in writing, of which the following is a true copy, to wit:

"This agreement, made this third day of January, 1882, between A. M. Dolph, of Cincinnati, O., of the first part, and the Troy Laundry Machinery Company, Limited, of Troy, N. Y., party of the second part, witnesseth:

1st. That the said A. M. Dolph, party of the first part, in consideration of the covenants hereinafter named made and to be kept,

shall furnish, crated or packed for shipment, delivered at depot
3 in Cincinnati, O., to the order of said Troy Laundry Machinery Company, Limited, and within a reasonable time after such order is received, certain washing machines, of standard size, of the style heretofore manufactured by the said A. M. Dolph as the "hydraulic washer," and known and herein designated as the "Standard Dolph washer," at the price of one hundred and ten dollars ($110) each, which shall be designated as the "manufacturers' price" for said Standard Dolph washer.

2nd. That the said Troy Laundry Machinery Company, Limited, party of the second part, in consideration of the covenants herein made and to be kept, agree to pay to the said A. M. Dolph the sum of one hundred and ten dollars ($110) each for said Standard Dolph washer delivered as before mentioned, and do bind themselves herein and agree to take at least fifty (50) Standard Dolph washers each year.

3rd. That the said A. M. Dolph shall have the refusal or option of manufacturing any and all washing machines sold by the said A. M. Dolph and said Troy Laundry Machinery Company, Limited, or for them through their agents, at the price of one hundred and ten dollars ($110) each for the said Standard Dolph washer, and at such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturer other than said A. M. Dolph, and these prices shall constitute and be designated as the manufacturers' prices for these machines.

4th. That the selling price of said Standard Dolph washer is hereby fixed at two hundred dollars ($200.00) each, and that the selling price of washing machines that may be sold by either
4 party hereto, other than the Standard Dolph washer, shall be fixed at a price the same in proportion to the designated manufacturers' price thereof as the selling price of the Standard Dolph washer is to its manufacturers' price, provided that the selling price of any of the aforesaid washing machines may be changed by the mutual consent of the parties hereto.

5th. That the said A. M. Dolph and the said Troy Laundry Machinery Company, Limited, do hereby agree together to equally divide between them, the said parties, the entire profits arising from the combined sales made by both parties or for them, through their agents, of any and all washing machines, and this profit shall be in all cases the entire margin between the designated manufacturers' price and the fixed selling price at the time the sale is made, provided that a discount or commission of twenty per cent. of the selling price may be allowed by either party to their regular and published agents, other than a paid employee, on sales actually made by said agents, which discount may be deducted from the profits before a division of same is made.

6th. Each party to this agreement shall furnish to the other party annually a sworn statement of the number of each kind of washing machines sold by them; also the profits made above the manufacturers' price on sales of washing machines other than the Standard

Dolph washer, and the number of each kind of washing machines sold by their agents.

7th. That the party of the second part agrees to pay to the party of the first part for all goods ordered and delivered according to articles one and two of this agreement within four months after the delivery of said goods.

5 8th. That at the close of each year a division of profits shall be made according to articles five and six of this agreement, and any balance found to be due to either party shall be paid to that party within the first two months of the year following.

9th. That on all washing machines furnished to the order of the said Troy Laundry Machinery Company, Limited, shall be fixed a plate inscribed with the name and place of business of the said company.

10th. This agreement shall be in force for the term of five years next ensuing.

In witness whereof the parties hereunto have set their hands and seals the day and year first herein written.

A. M. DOLPH. [SEAL.]
DELEVAN PECK, *Pres't.*
CHARLES ANGUS, *Sec'y.*

[Corporate Seal of Company.]

Witness:
L. J. OGBORN.
Witness:
C. H. TODHURST."

This plaintiff alleges and avers that he has fully and completely kept and performed all the terms and conditions of the said contract on his part, and is still ready, willing, and anxious so to do and hereby offers so to do; that after the signing of said contract he at great expense fully equipped his factory for the purpose and proceeded to manufacture a full supply of Dolph Standard washers and has kept himself continually in a condition to manufacture a full supply of the same and to manufacture any and all other kinds of machinery desired by said defendant according to the terms of said contract.

He further alleges that the defendant for a time proceeded to order and receive from the plaintiff the said Dolph Standard

6 washers and sold the same in large numbers, but the said defendant has failed and refused to comply with the terms and conditions of the said contract on its part to be done and performed, in that defendant has failed and refused to render to plaintiff a full, complete, and correct statement of the entire profits from the sales made by it as in and by said contract said defendant was required to do, and further in that said defendant has failed and refused to furnish to this plaintiff a sworn statement of the number of machines sold by it, of the profits made above manufacturer's price on sales of washing machines other than the Dolph Standard washer, of the number of each kind of machines sold by said company's agents, and has failed and refused to state who defendant's

agents were for the sale of such machines, as in and by said contract said defendant was required to do.

The plaintiff further alleges that in such statement of profits as the said defendant has rendered it has deducted the percentage on sales purporting to have been made by regular and established agents, and has failed and refused to notify this plaintiff that it had such agents and has not published the same as it was bound to do.

Plaintiff further alleges and avers that the said defendant has failed to order any machines from plaintiff since the 1st day of March, 1883, as it was bound to do by the terms of said contract, and that by reason thereof this plaintiff has been compelled to manufacture a smaller number of machines at a greater relative cost of each machine to him, and that by such failure to order machines on the part of said defendant the plaintiff has suffered damage to a large amount.

7 This plaintiff further alleges that the defendant has failed and refused to account to him for the manufacturers' profit and one-half of the margin of profit between manufacturers' price and selling price on all washing machines sold and to be sold by the defendants from and after December 31, 1882, to which this plaintiff is entitled in and by the terms of said contract, and that by reason of said refusal, failure, and neglect the plaintiff has suffered damage to a large amount, but in what exact amount plaintiff is unable to state by reason of the failure of said defendant to render to him such statements as aforesaid.

This plaintiff further alleges that by reason of the defendant having under the contract the sale of the plaintiff's manufactured machines, which were of very superior quality, the said defendant was enabled to sell and did sell other machines which were not manufactured by this plaintiff to customers of this plaintiff, and thus diverted from him a large amount of trade which would otherwise have come to him, and thereby prejudiced the sale of plaintiff's machines and cut down the profits arising therefrom, and the defendant by its breach of said contract has thus caused the said plaintiff to suffer damage to a large amount.

And this plaintiff, further complaining of the defendant, alleges that, relying upon the terms of said contract and expecting the defendant to perform the same in good faith, he was compelled to refuse and did refuse other advantageous offers for handling his machines to his great detriment and damage, and that, relying upon the promises of said defendant in said contract, plaintiff has been com-

8 pelled to and has actually come into hostile competition with various other parties who are hostile and opposed to the said defendant and who would not have been hostile to this plaintiff except for his said connection with the said defendant, and that by reason of defendant's breach of the contract plaintiff has in this way suffered great detriment and damage.

This plaintiff further alleges that the said defendant has refused and neglected and still refuses and neglects to fulfill and perform the terms of said contract on its part and to comply with the con-

ditions thereof, and that defendant has entirely and wholly repudiated said contract and refused to perform the same.

And this plaintiff further alleges that by reason of the premises he has suffered damages to a large amount, to wit, the sum of thirty thousand dollars ($30,000).

Wherefore this plaintiff prays unto this court that he may have judgment against the defendant for the said sum of thirty thousand dollars ($30,000) and for the costs of this action.

STEDMAN AND SHEPARD AND
LLOYD AND TAFT,
Attorneys for the Plaintiff.

STATE OF OHIO, }
Hamilton County, } ss:

A. M. Dolph, the plaintiff, being first duly sworn according to law, says that the allegations of the foregoing petition are true, as he verily believes.

9 ALEXANDER M. DOLPH.

Sworn to before me and subscribed in my presence this 5th day of February, A. D. 1884.

OTTO PFLUEGER,
Notary Public, Hamilton County, Ohio. [SEAL].

(Indorsed:) No. 2520. United States circuit court in and for the circuit and district of northern New York. Alexander M. Dolph, pl'ff, *vs.* The Troy Laundry Machinery Company (Limited), def't. Copy petition. Stedman & Shepard and Lloyd & Taft, counsel for plaintiff.

10 *Stipulation.*

Circuit Court of the United States, Northern Dist. of New York.

ALEXANDER M. DOLPH
ag'st
THE TROY LAUNDRY MACHINERY COMPANY, Limited.

It is hereby consented that George L. Stedman, of Albany, N. Y., and H. P. Lloyd, of Cincinnati, O., be substituted as attorneys for the plaintiff in this action.

Utica, M'ch 26, 1886.

STEDMAN & SHEPARD,
Att'ys for Pl'ff, A. M. Dolph.
H. P. LLOYD, *Att'y for Pl'ff.*

(Indorsed:) Law, 2520. U. S. circuit court, nor. dist. of New York. A. M. Dolph against The Troy Laundry Machinery Co., Limited. Substitution of Geo. L. Stedman as counsel for pl'ff. Filed Mar. 26, 1886. W. S. Doolittle, clerk.

11 *Order of Substitution.*

In the Circuit Court of the United States for the Northern District of New York.

UTICA, *March* 26, 1886.

Present: Hon. William J. Wallace, circuit judge.

ALEXANDER M. DOLPH
v.
THE TROY LAUNDRY MACHINERY CO., Limited. } Law. 2520.

On reading and filing stipulation signed by the respective parties hereto, and on motion of Mr. G. L. Stedman, of Albany, N. Y.—

Ordered that he and H. P. Lloyd, of Cincinnati, O., be, and they hereby are, substituted as attorneys for the plaintiff in the above-entitled action.

12 *Answer.*

U. S. Circuit Court for the Northern District of New York.

ALEXANDER M. DOLPH
ag'st
THE TROY LAUNDRY MACHINERY COMPANY (Limited). } No. 2520.

This defendant, The Troy Laundry Machinery Company (Limited), in answer to the plaintiff's complaint in the above-entitled action, admits the residence of the plaintiff, as alleged in the complaint herein, and also admits that it, this defendant, is a corporation duly organized and doing business, as is alleged in said complaint.

Second. This defendant, further answering said complaint, denies that on the 3d day of January, 1882, or at any other time it entered into or executed the contract set forth in the complaint herein.

Third. This defendant, further answering said complaint, alleges that shortly prior to the said 3d day of January, 1882, negotiations were had between certain officers of this defendant and plaintiff, in which it was agreed that a contract substantially like that set forth in the complaint, except as to the term of its continuance, should be made between plaintiff and defendant; that at that time the said plaintiff urged that the contract should continue for five years that such proposition was explicitly rejected by said officers of this defendant on the part of this defendant, and they then
13 stated to the plaintiff that they would consent to a contract for three years and no longer, to which the said plaintiff finally consented; that a draft contract in duplicate was drawn by one of the officers of this defendant and sent to the plaintiff for approval and execution, in which the term of the contract was fixed at three years; that the plaintiff sent on to the defendant for execution duplicate contracts substantially the same as the draft contracts of defendant, only differing in some trifling particulars; that the plaintiff fraudulently inserted in said contracts the word "five" in place of

the word "three," in the tenth clause thereof, making the continuance for five years instead of three; that the president and secretary of the defendant failed to notice this alteration and signed the contracts and returned one of them to the plaintiff, supposing that the same was to continue for three years and no more; that the plaintiff did not in any manner call the attention of this defendant to the fact that he had made the alteration in the agreement above set forth; that the president and secretary of this defendant had no authority from the company to make a contract for more than three years, and said alleged contract recited in the complaint herein was and is void for want of proper authority on their part to make and execute the same.

Fourth. Defendant, further answering said complaint, alleges it has no knowledge or information sufficient to form a belief as to whether or not the plaintiff has kept and performed the alleged contract set forth in the complaint herein by equipping his factory for the purpose at great expense and proceeding to the manufacture of a full supply of Dolph Standard washers, and has kept
14 himself continually in a condition to manufacture a full supply of the same, and to manufacture any and all other kinds of machinery desired by this defendant, as alleged in said complaint.

Fifth. This defendant admits that for a time it ordered Dolph Standard washers of the plaintiff to some extent, but it was before it had discovered the alteration in the contract above mentioned; that upon the discovery of such alteration it called the attention of the plaintiff to it and asked him to correct the same; that plaintiff refused to correct the same, and insisted upon enforcing said alleged contract, as recited in the complaint herein; that this defendant then notified the plaintiff that it repudiated the alleged contract and would not be bound by it; that since said notice this defendant has refused to perform the said alleged contract and has refused to render statements to the plaintiff, as charged in the complaint, and has refused to furnish the names of its agents to plaintiff.

This defendant further admits that since it repudiated the said alleged contract as aforesaid it has omitted to order washing machines of the plaintiff, and it has no knowledge or no information sufficient to form a belief as to the manufacture of machines by plaintiff at greater relative cost of each machine to him, as alleged in his complaint.

Defendant also admits that it has refused to account to the plaintiff for the profits on washing machines sold by it since its repudiation of said alleged contract as aforesaid, and it also admits that it has wholly repudiated said alleged contract and refused to perform the same.

15 Sixth. And for a further and separate defence this defendant alleges that the plaintiff herein and this defendant were each large manufacturers of laundry machinery at the date of said alleged contract, and that both manufactured and sold washing machines for the market; that the plaintiff was manufacturing and selling a machine called the "Dolph Standard washer," and this de-

fendant was making and selling other washing machines that came in competition with it, and that such competition compelled the parties to deliver their machines to the public at lower prices than they would otherwise have demanded; that the actual cost of making said Dolph Standard washer and putting the same on the market was not more than forty-five dollars each, and that by said alleged contract the price to purchasers was to be two hundred dollars, being a profit of over three hundred per cent.; that the sole design and object of said alleged contract was to prevent competition between plaintiff and defendant and to enhance the price of washing machines to be paid by the public, and that for that reason the said alleged contract was and is null and void.

Wherefore this defendant demands that the complaint herein be dismissed with costs.

SMITH, FURSMAN & COWEN,
Def't's Att'ys.

Office & P. O. address, No. 1 Mutual b'ld'g, Troy, N. Y.

16 COUNTY OF RENSSELAER, *ss:*

Charles Angus, being duly sworn, deposes and says that he is the secretary of the defendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES ANGUS.

Sworn to before me this 29th day of March, 1884.
WM. NORTH,
Notary Public, Rens. Co., N. Y.

(Indorsed:) U. S. circuit court, northern dist. of New York. 2520. Alexander M. Dolph ag'st The Troy Laundry Machinery Company (Limited). Copy. Answer. Smith, Fursman & Cowen, attorneys for defendant; office and post-office address, No. 1 Mutual building, Troy, N. Y. To Stedman & Shepard, Esqrs., attorneys for pl'ff. Filed May 19, 1887. W. S. Doolittle, clerk.

17 *Minutes of First Trial.*

At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in the city of Utica, on the 23d day of March, 1886.

Present: The Honorable Alfred C. Coxe, judge.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY (Limited). } No. 2520.

Appearances: For plaintiff, Mr. George L. Stedman, Mr. H. P. Loyd; for defendant, Mr. Cowen.

On motion of Mr. G. L. Stedman, ordered that a jury be impaneled, and that the trial of this action do now proceed.

Whereupon the following-named jurors were called and sworn: William Powell, William C. Moulton, J. E. Roberts, Edward Rae, Thomas C. Wilds, Peter Scott, John E. James, Hemon Roberts, Rowland H. Lewis, Edward Morris, Abraham Jones, Frank Sang.

18 WEDNESDAY, *March* 24, 1886.

Trial continued.

Mr. Lloyd opens for plaintiff.

Plaintiff's witnesses: Alexander M. Dolph, Charles Angus.

THURSDAY, *March* 25, 1886.

Trial continued.

Plaintiff's witnesses: Charles Angus (continued), Alexander M. Dolph, recalled.

Plaintiff rests.

Motion by defendant to direct a verdict denied.

Mr. Esek Cowen opens for defendant.

Defendant's witnesses: Charles Angus, Delavan Peck, Henry Kelly, Allen Conkling.

Defendant rests.

Plaintiff's witnesses in rebuttal: Alonzo P. Adams (deposition), Lizzie J. Ogden (deposition).

FRIDAY, *March* 26, 1886.

Plaintiff's witness: Alexander M. Dolph, recalled.

Defendant's witness: Charles Angus.

19 Defendant renews its motion to direct a verdict.

Denied.

Defendant moves the court to direct a verdict of nominal damages.

Denied.

Mr. Esek Cowen sums up for defendant.

Mr. G. L. Stedman sums up for the plaintiff.

Judge Coxe charges the jury, and they retire, in charge of a sworn bailiff, to consider their verdict.

The jury here come into court and, being called, all answer and say they find a verdict in favor of the plaintiff in the sum of $16,000.

Defendant moves for a new trial on the minutes on the ground of excessive damages. The hearing of the motion is reserved and a stay of sixty days granted.

20 *Motion for a New Trial.*

At a stated term of the circuit court of the United States of America held in and for the northern district of New York and second circuit, at the U. S. court-house, in Canandaigua, on the 15th day of June, 1886.

Present: The Honorable William J. Wallace, the Honorable Alfred C. Coxe, judges.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } No. 2520.

Mr. Esek Cowen, counsel for defendant, is heard for the motion.
Mr. G. L. Stedman, counsel for plaintiff, is heard in opposition.
Court takes papers.
Decision reserved.
1886, September 8, decision filed; new trial granted.

21 *Minutes of Trial.*

At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in Utica, on the 25th day of March, A. D. 1887.

Present: The Honorable Alfred C. Coxe, judge.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

Appearances: Mr. G. L. Stedman and Mr. H. P. Lloyd, for plaintiff; Mr. Esek Cowen, for defendant.

Ordered that a jury be impaneled and that the trial of this action do now proceed.

Whereupon the following-named jurors were called and sworn: Horace C. Matteson, Gustave Fehrman, Charles H. Bush, H. G. Clark, Nathan Overend, Charles H. Barby, Henry J. Garthside, G. W. Cushman, John M. Graham John G. Alsheimer, John Adrian, Gotlieb Zitzner.

Case opened to the jury in behalf of the plaintiff by Mr. H. P. Lloyd.

Plaintiff's witness: Alexander M. Dolph.

Court here takes a recess until 2.30 p. m.

22 2.30 P. M.

Court meets.
Present as before.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

Trial continued.

Plaintiff's witnesses: Alexander M. Dolph (continued), Delavan Peck, Charles M. Angus.

Court here adjourns until 10 a. m. to-morrow.

SATURDAY, *March* 26, 1887—10 a. m.

Court meets pursuant to adjournment.

Present: The Hon. Alfred C. Coxe, judge.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

Trial continued.
Jury called. All answer.
Plaintiff's witnesses: Charles M. Angus (continued), George W. Gordon, Alexander M. Dolph (recalled).
Plaintiff rests.
23 Evidence closed.
Defendant, by its counsel, Mr. Esek Cowen, moves for a nonsuit.
Motion denied.
Defendant, by its counsel, Mr. Esek Cowen, moves the court to direct a verdict for plaintiff for nominal damages only.
Motion denied.
Mr. Esek Cowen sums up for the defendant.
Court here takes a recess until 2.30 p. m.

2.30 P. M.

Court meets.
Present as before.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

Mr. Stedman sums up for plaintiff.
Judge Coxe charges the jury, and they retire, in charge of a sworn bailiff, to consider their verdict.
Court here takes a recess until 7.30 p. m.

24 7.30 P. M.

Court meets.
Present as before.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

The jury here come into court and, being called, answer and say they find a verdict for plaintiff in the sum of $7,208.
On motion of defendant's counsel—
Ordered that a stay of proceedings be granted herein for the period of thirty days.

25 *Judgment.*

United States Circuit Court, Northern District of New York.

ALEXANDER M. DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY, Limited. } At Law. No. 2520.

Judgment of May 19, 1887.

This action having been brought to trial at a term of this court held on the third Tuesday of March, in the year one thousand eight hundred and eighty-seven, at the court-house, in the city of Utica, before the Honorable Alfred C. Coxe, judge, and a jury, and a verdict having been duly rendered herein on the 26th day of March, during said term, in favor of the plaintiff and against the defendant for seven thousand two hundred and eight dollars, and the costs in this action having been duly taxed at $240.98—

Now, on motion of Mr. George L. Stedman, attorney for the plaintiff, it is adjudged that Alexander M. Dolph, the plaintiff, do recover of The Troy Laundry Machinery Company, Limited, the defendant, the sum of seven thousand two hundred and eight dollars, together with two hundred and forty dollars and ninety-eight cents, costs and disbursements, amounting in all to seven thousand four hundred and forty-eight dollars and ninety-eight cents.

Judgment signed, entered, and docketed this 19th day of May, A. D. 1887, at 12 o'clock m.

W. S. DOOLITTLE, *Clerk.*

26 (Indorsement on cover:) Law. No. 2520. United States circuit court, northern district of New York. Alexander M. Dolph *vs.* The Troy Laundry Machinery Co., Limited. Judgment-roll. G. L. Stedman, attorney for plaintiff, Albany, N. Y. Dam., $7,208.00; costs, 240.98—$7,448.98. Filed and entered May 19, 1887, 12 o'clock m. W. S. Doolittle, clerk.

27 *Bill of Exceptions.*

United States Circuit Court, Northern District of New York.

ALEXANDER M. DOLPH
against
THE TROY LAUNDRY MACHINERY COMPANY, Limited. }

The issues in this action were tried at the United States court-rooms, in the city of Utica, on the 25th and 26th days of March, 1887, before Hon. Alfred C. Coxe and a jury.

The certificate of incorporation of the defendant was received in evidence.

ALEXANDER M. DOLPH, the plaintiff, was then sworn in his own behalf, and testified that he resided and had resided for all his life

in Cincinnati, Ohio, and in the year 1881 was engaged in the manufacture and sale of laundry machinery; that at the beginning of the year 1882 he had good facilities for manufacturing; had just built a large new factory for that purpose; that he had facilities for doing the amount of business he had then and had sufficient capital for his business.

The contract between the parties was put in evidence and marked Exhibit 1. The signature and corporate seal are both admitted.

28 This agreement, made this third day of January, 1882, between A. M. Dolph, of Cincinnati, O., of the first part, and the Troy Laundry Machinery Company, Limited, of Troy, N. Y., party of the second part, witnesseth:

1st. That the said A. M. Dolph, party of the first part, in consideration of the covenants hereinafter named, made, and to be kept, shall furnish, crated or packed for shipment, delivered at depot in Cincinnati, O., to the order of said Troy Laundry Machinery Company, Limited, and within a reasonable time after such order is received, certain washing machines of standard size of the style heretofore manufactured by the said A. M. Dolph as the hydraulic washer, and known and designated as the Standard Dolph washer, at the price of one hundred and ten dollars ($110) each, which shall be designated as the manufacturer's price for said Standard Dolph washer.

2d. That the said Troy Laundry Machinery —, Limited, party of the second part, in consideration of the covenants herein made and to be kept, agree to pay to the said A. M. Dolph the sum of one hundred and ten dollars ($110.00) each for said Standard Dolph washer delivered as before mentioned, and to bind themselves herein and agree to take at least fifty (50) of said Standard Dolph washers each year.

3rd. That the said A. M. Dolph shall have the refusal or option of manufacturing any and all washing machines sold by the
29 said A. M. Dolph and said Troy Laundry Machinery Company, Limited, or for them through their agents, at the price of one hundred and ten dollars ($110.00) each for the said Standard Dolph washer and at such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturers other than said Dolph, and these prices shall constitute and be designated as the manufacturer's prices for these machines.

4th. That the selling price of the said Standard Dolph washer is hereby fixed at two hundred dollars ($200.00) each, and that the selling price of washing machines that may be sold by either party hereunto other than the Standard Dolph washer shall be fixed at a price the same in proportion to the designated manufacturer's price thereof as the selling price of the Standard Dolph washer is to its manufacturer's price, provided that the selling price of any of the aforesaid washing machines may be changed by the mutual consent of the parties hereto.

5th. That the said A. M. Dolph and the said Troy Laundry Ma-

chinery Company, Limited, do hereby agree together to equally divide between them, the said parties, the entire profits arising from the combined sales made by both parties or for them through their agents of any and all washing machines, and this profit shall be in all cases the entire margin between the designated manufacturer's price and the fixed selling price at the time the sale is made, provided that a discount or commission of twenty per cent. of the selling price may be allowed by either party to their regular published agents other than a paid employee on sales actually made by said agent, which discount may be deducted from the profits before a division of the same is made.

6th. Each party to this agreement shall furnish to the other party annually a sworn statement of the number of each kind of washing machines sold by them; also the profits made above manufacturer's price on sales of washing machines other than the Standard Dolph washer, and the number of each kind of washing machine sold by their agents.

7th. That the party of the second part agrees to pay to the party of the first part for all goods ordered and delivered according to articles one and two to this agreement within four months after the delivery of said goods.

8th. That at the close of each year a division of profits shall be made according to articles five and six of this agreement, and any balance found to be due to either party shall be paid to that party within the first two months of the year following.

9th. That on all washing machines furnished to the said Troy Laundry Machinery Company, Limited, shall be fixed a plate inscribed with the name and place of business of the said company.

10th. This agreement shall be in force for the term of five years next ensuing.

In witness whereof the parties hereunto have set their hand and seal the day and year first herein written.

A. M. DOLPH. [SEAL.]
DELAVAN PECK, *Pres't.*
CHARLES ANGUS, *Sec'y.*

[Corporate Seal of the Company.]

Witness:
J. L. OGBERN.
Witness:
C. H. TOLHURST.

That when this contract was agreed upon he immediately set to work to execute it and to shape his business accordingly; that he prepared his plant and put it in shape for such extra facilities as he needed, and immediately entered upon the discharge of the contract; that his facilities during the year 1882 were sufficient to fill the orders contemplated by this contract and to supply such machines as were ordered; that he had ample facilities for manufacturing all machines that were contemplated under this contract, in that he had ample room for the enlargement of it, and had already put it in shape as far as the business showed that it warranted and

in such shape that on a day's or a week's notice he could perform the demands of the contract; that he has since learned by information from the defendant the number of other washing machines that have been sold by the defendant company during the period covered by this contract; that he had facilities for manufacturing that number of machines; that during the year 1882 his factory was not run to its fullest capacity in making the machines that he had actually manufactured, nor was it during the years 1883, 1884, 1885, and 1886; that he put himself in a condition to fulfill the contract promptly; he made some special machinery for getting out that class of machines rapidly and cheaply; that he had
32 the personal supervision of all the business himself.

The sworn statement rendered by the defendant company to the plaintiff at the close of the year 1882, showing their account of the transactions of that year, was received in evidence and marked "Plaintiff's Exhibit No. 2."

33 "Ex. 2."

Statement of Washing Machines Sold During the Year Ending December 31, 1882, by Troy Laundry Mach'y Co., Limited, and by Their Regular Published Agents Other than Paid Employees.

Style of machine.	Number sold by ——.	Number sold by agent.	Total number sold.	Manufacturer's price.	Selling price.	Profit.
Dolph No. 2 or "Standard"	43	13	56	6,160	11,200	5,040
" No. 4	6	------	6	1,140	2,100	960
" brass	1	------	1	400	500	100
" # 2 or Standard, used at exposition & sold 2nd hand	1	------	1	110	150	40
Other washing machines than above makes as follows:						
Munger No. 1	7	2	9	720	1,125	405
" " 2	4	14	18	2,070	3,600	1,530
" " 4	------	1	1	195	400	205
" brass	2	------	2	1,000	1,100	100
" No. 1, 2nd hand	1	------	1	80	75	0
Total	65	30	95	11,875	20,250	8,380
Less commissions allowed regular published agents other than paid employees						1,210
Net profits						7,170

During this year there *was* four dash-wheels sold for $1,045, the actual cost of which was $1,051.

STATE OF NEW YORK, } ss:
Rensselaer County, }

Charles Angus & Allen Conkling, being dul y sworn, say the above is a full and correct statement of profits, number and kind of machines sold according to articles 5 and 6 of the agreement of Jan. 3d, 1882, between A. M. Dolph and Troy Laundry Machinery Co. (Limited).

CHAS. ANGUS.
ALLEN CONKLING.

Sworn to and subscribed before me this 28th day of February, 1883.

C. E. KILMER,
Notary Public, Rensselaer County.

34 That by that statement 56 Dolph Standard washers No. 2 are shown to have been transferred by him and sold by the defendants during that year, and also 6 No. 4, 1 brass machine, and other No. 2 Standard, 7 Munger No. 1, 4 Munger No. 2, 2 Munger brass, and 1 Munger No. 1; the aggregate price for the Dolph Standards was $11,200; for the Dolph No. 4, $2,100; for the Dolph brass machine, $500; of another, called a second-hand No. 2 Dolph washer, $110; for the No. 1 Munger, 9 machines, $1,125; for the No. — Munger machines, $3,600; for the No. 4 Munger machines, $400; for the No. 2 Munger brass machines, $1,100; for the one second-hand No. 1, $75; total, $20,250.

The letter of transmittal with which this statement was sent by the defendant company to the plaintiff, dated February 28th, 1883, was received in evidence and marked "Plaintiff's Exhibit No. 3."

Copy.

TROY, N. Y., *Feb. 28th*, 1883.

A. M. Dolph, Esq.:

Enclosed we hand you statement of washers sold by us during the past year:

Our net profits for the year	$7,170
Less one-half	$3,585
	$3,585
Less one-half of your net profits	1,513 12
Amount due you	2,071 88

We have been delayed with some important matters to-day and have just time to get this into to-night's mail; will write you in full to-morrow.

Yours, TROY LAUNDRY MACHINERY CO.

35 On the margin of the statement there was written: "During the year there were 4 dash-wheels sold for $1,045, the actual cost of which was $1,051."

These are a washing machine used for washing large, heavy pieces; the name is from the peculiar action of the clothes and the washing inside, the dashing of the clothes as they are washed; it is different from the "hydraulic washer" which is spoken of under the contract and which he furnished under the name of the "Dolph Standard washers;" that the dash-wheels were larger and more expensive; that the Dolph Standard washer consisted of an outer cylinder made of heavy wood, perhaps two inches thick; it is watertight and has a door in it lengthwise, or lid, which can be opened to get at the cylinder, and the top or outer cylinder is perhaps three feet in diameter and four and a half feet long; that there is an inner cylinder or cage with trunnions or journals on each end; the cylinder is horizontal, and this cage or inner cylinder is composed of staves somewhat like a barrel; it has an oblong door in it, so that the clothing may be put on the inside of the inner cylinder; the shell of this inner cylinder is composed of staves and what we term "ribs" alternately; the staves have two rows of holes in them, so that water could pass in and out freely, and the ribs are made to project further into the interior of the tub or past the staves toward the interior of the tub, and they give strength to the cylinder that way; there is a proper mechanism attached to the journal of the inner cylinder, which protudes through one end of the outer
36 tub, and there is a gearing put on the outside which rotates the inner cylinder within the outer one, and there is a revolving mechanism, so that after revolving one way for awhile the inside cylinder will reverse and revolve in the opposite direction; there is an automatic mechanism for causing this reversing motion; that the No. 2 washer was about three and a half feet high; that the outer cylinder was supported on four iron legs; that the outside dimension of that machine was from four and a half to five feet, and the gearing and the reversing mechanism on the outside perhaps a foot and a half more. The No. 1 machine is a smaller size than the No. 2, the number 2 being the Standard, the No. 3 larger, and the No. 4 still larger. The No. 5 is the same size as the No. 3, and the brass washer, the No. 6, is the same size as the No. 3.

The sworn statement of Mr. Dolph rendered to the defendant company, covering the year 1882, was offered in evidence and marked "Plaintiff's Exhibit No. 3 A."

37 "Ex. 3 A."

Statement of Washing Machines Sold During the Year Ending December 31, 1882, by A. M. Dolph and by His Regular Published Agents Other than Paid Employees.

Style of machine.	Number sold by A. M. Dolph.	Number sold by agent.	Total number sold.	Manufacturer's price.	Selling price.	Profit.	
Dolph No. 2 or Standard	31	------	31	110	200	2,790	Prices changed by mutual consent according to article 4th of agreement on #4 washer July 28th, 1882, and on brass washer June 22nd, 1882.
" No. 4 (sold March 20, '82)	1	------	1	220	400	180	
" brass							
Other washing machines than above makes as follows:							
#1 Munger washer	1	------	1	68 75	125	56 25	
Total	33	------	33			3,026 25	
Less commissions allowed regular published agents other than paid employees						0,000 00	
Net profits						3,026 25	

STATE OF OHIO, *Hamilton County,* } *ss:*

A. M. D., being duly sworn, says the above is a full and correct statement of profits, number and kind of machines sold according to articles 5 and 6 of the agreement of Jan. 3d, 1882, between A. M. Dolph and Troy Laundry Machinery Co. (Limited).

A. M. D.

Sworn to and subscribed before me this 2 day of J'n'y, 1883.

CLEMENT L. BATES,
Notary Public, Hamilton County, O.

38 The witness stated that this paper correctly recited the number of machines sold by him during that year, and the price at which they were sold, and the net amount of profit for which he was accountable to them; it shows a sale of 31 Dolph No. 2, sold by A. M. Dolph at an aggregate profit of $2,790; it shows a manufacturer's price and the selling price; that the manufacturer's price was $110 and the selling price was $200 on the machines sold by him during the year 1882, and that the aggregate profit on these machines was $2,790. The statement shows 1 No. 4 machine sold at a manufacturer's price of $220, a selling price of $400, and a net profit of $180; it shows a Munger washer No. 1 sold at a manufacturer's price of $68.75, at a selling price of $125, and a net profit of $56.25; that on the margin of the paper was "prices

changed by mutual consent, according to article 4 of agreement, on No. 4 washer July 28th, 1882; on brass washer, June 22nd, 1882;" that this showed the date at which the prices were changed under the clause of the agreement which provided that they might be; that the cost to him of the manufacture of these Dolph washers No. 2 during the year 1882 was between $92.50 and $75—the beginning of the year, $92.50, and at the close of the year $75; that the price gradually reduced during the year; that there were in all 55 washing machines sold by him during the year 1883; there were 46 of the Dolph No. 2—that is, the Standard washer; there were 4 of No. 4, four of No. 5, and one of No. 6; that the cost of the manufacture of the Dolph Standard No. 2 during the year 1883 was from $75 down to $60; the cost at the close of the year and the beginning year was $75, and that as they manufactured dur-
39 ing the year and manufactured more largely and reduced the cost that brought it down to $60 at the close of that year and the beginning of the next; that the cost of the manufacture of the No. 4 machines was somewhere in the neighborhood of $150; that of No. 5 was in the neighborhood of $200; that was partially a metallic machine; that the cost of No. 6—the brass machine—was from $250 to $300; there were very few of them made; that the average price which he received for his No. 2 Standard Dolph washers during the year 1883 was $180; that the average price for which he sold his No. 4 washers during the year 1883 was, as near as he could tell, from $325 to $350; there were very few sold; that of the No. 5 washers in the same year was about $350, he thought, and of the No. 6 washers—the brass washers—between $450 and $500, he didn't remember the price, there being only one sold; that during the year 1884 he sold 39 No. 2 Standard Dolph washers, and that the average price for that year was $135; that during the same year he sold two No. 1's at about $110; that he sold 3 No. 3's at the average price of $200 or $225—between these two figures; that he sold 6 of the No. 4 at an average price of from $225 to $250 each; he sold four No. 5 washers in 1884 at an average price of $275 each; that he sold none of No. 6 during the year; that the cost of the manufacture of the No. 2 Standard Dolph washers in the year 1884 was between $50 and $60; that at the beginning of the year it was $60, and at the close of the year near the lowest limit that they made them; the price gradually reduced during the year; that the cost of the manufacture of the No. 3 machines during the same year was in the neighborhood of $100; that the No. 4 machines did not vary much in price from year before;
40 it was in the neighborhood of $150; that the No. 5 machine remained about the same in cost—about $200; that the No. 6 machine cost between $250 and $300; that there were so few of the No. 1 machines made during the year 1884 that they did not cost much less than the No. 2—perhaps $50 apiece; that there was one No. 1 machine sold during the year 1885; that he thought the price was $100; that there were 67 No. 2's at the average price of $122; that there were 20 No. 3 machines at the average price of $150; that there — 3 No. 4's sold, and that the average price was,

as near as he could recollect, $200; that there were 3 No. 6's sold during that year at an average price of $475. That completes the list for the year 1885; that the No. 1 machines cost that year to manufacture about $45; that the No. 2 machines cost that year to manufacture about $46.60; the No. 3, $75; the No. 4, between $125 and $150; that they had reduced the cost of the manufacture of the No. 6 to $275; that he did not think the cost of the manufacture of the No. 5 machine during that year was much, if anything, less than the year 1884; that the cost was substantially the same. There had not been enough of them made to make any great difference in price; that he sold during the year 1886 2 No. 1 machines at an average price, he thought, of $90; 105 No. 2 machines at an average price of $110; 31 No. 3 machines at an average price of $150; 9 No. 4 machines at an average price of $167; three No. 5 machines at an average price of $250; six No. 6 machines at an average price of $425; that the cost of the manufacture of the machines during the year 1886 was as follows: The No. 1 machines at about
41 the price of the No. 2, $46.60, crated; the No. 2 machines, $46.60; the No. 3, $75; the No. 4, $125; the No. 5, about $180; the No. 6, $250; that he was familiar with most of the defendant's machines; that he had knowledge what it would cost him to manufacture the machines—such as defendant's company had been selling; that during the year 1883 there were sold by the defendant company the No. 1, the No. 2, the No. 4 of my No. 4, which is their No. 3, and the brass washer, which is my No. 6; that the No. 2, which is called in the contract "the Standard Dolph washer," represented the same size machines as used by other manufacturers; was called No. 2 by other manufacturers for a corresponding size; that, with the exception of the brass machine, he could have made the defendant's machine at something less than the cost of his machine, each corresponding size; that in 1883 and 1884 he could have manufactured them for at least ten per cent. less and about the same in the years 1885 and 1886, and for the other machine of the regular sizes about ten per cent. less; that on the first statement rendered him there was a return made of four dash-wheel machines having been sold during the year 1882, and that he had knowledge that subsequent to that time there were other dash-wheel washing machines sold by the defendant's company; that he had been engaged in manufacturing off and on for twenty years; that he had been engaged in making and selling laundry machinery about eight years; that he thought he had shipped to the defendant's company during the year 1883, between the 1st of January and the 1st of March, 14 of the Dolph Standard Washers; that he
42 thought about the 1st of March, 1883, by letter, he received the first intimation from the defendant's company with regard to the intended repudiation of the contract.

The letter was offered and received in evidence, marked Plaintiff's Exhibit 4.

Copy.

TROY, N. Y., *M'ch 1st*, 1883.

A. M. Dolph, Esq.:

Replying to yours of Jan. 13th regarding contract, it is hardly necessary to tell you that Mr. Adams never did any business for this company. In all the discussions you say, "Have never heard any other time than five years mentioned."

Your memory must be poor indeed if the conversation between yourself and the president and secretary of this company in your private office, at Cincinnati, in March, 1882, has been forgotten. It was then the terms of the contract were agreed upon. Mr. Peck refused to make contract for five years, and we all agreed on three years, and at same time arranged to have your name left off and machines shipped on our order—simply the word patented, with the date, put on and our name-plate. On our return we reported to our directors the terms we had agreed on and they authorized and directed the officers to enter into a contract with you for three years, and Mr. Conkling drew up a contract in duplicate for that time, and embodying what he had agreed on, and mailed to you, which you never returned, but sent one written by yourself. How this
43 contract came to be executed for five years is a mystery to us, unless we had the three-year idea so firmly in our mind that it — taken for granted. We never knew until months afterwards, a short time before you called in Troy and — called your attention to it—that was the first opportunity—that it was for five years; and then you say you decline to change the contract, and thus announce your intention of taking advantage of our error and inadvertence when you are equitably and morally bound to do as was mutually agreed. Very well; as a matter of justice simply we render the statement, and are ready to send you draft for the division of profits for the year 1882, and also for the machines ordered up to this date; but now notify you that from this date this company repudiates the contract and does not consider itself bound by it, because its officers have exceeded their authority and the positive instruction given them in making it, and because, as our counsel informs us, which we were not aware of, that it is likely to violate the law of this State against combinations formed to prevent competition. We prefer to settle this question with you at once, by law or otherwise, while we are all here and the matter is fresh, than to defer it.

In the meantime if you desire to furnish us washers out and out at some price we may agree upon we will continue to order of you; if not, we shall build them in Troy.

Respectfully, DELEVAN PECK, *Pres't.*

That there was another letter prior to the one of March 1st received by him upon the same subject; that the letter of March 1st was not the first letter in which this matter was first broached
44 in the form it appears here; that the prior letter did not state the repudiation as clearly as the one of March 1st.

Letter of the defendant company to Mr. Dolph, dated January 18th, 1883, received and read in evidence, marked Plaintiff's Exhibit No. 5.

TROY, N. Y., *Jan. 18th*, 1883.

A. M. Dolph, Cincinnati, O.

SIR: Your letter, with contract, received. I am very sorry our friendly relations of only one year must terminate so soon by your decision. The contract was signed by me under instructions from our board of directors to make it for three years and the oversight of five years in contract can't hold against the resolution, and I see plainly that we will have trouble at the end of the three years, so we might as well have it now, when everything is fresh in our minds. I don't want a lawsuit left to my estate and you don't want one left on hand for your wife, for at the end of three years both of us may be on the other side.

I think it would be better to have it arranged without trouble, but you are the doctor.

Respectfully, DELAVAN PECK, *Pres't.*

That he thought the letter of March 1st, 1883, was the last letter as to the repudiation of the contract; that this letter was received in the due course of mail; that he was not sure that there were any machines ordered by the Troy company of him subsequent
45 to March 1st, 1883; that his business relations terminated upon the receipt of this letter by him from them, and that he furnished to them no more machines under this contract because none were ordered; that after he received this notification of the breach of the contract with reference to these machines he was at first considerably nonplussed to know what to do, but as soon as he found that appearances indicated that they meant that repudiation and would not act under the contract, then he tried to do the best he could in selling machines and to put as many on the market as he could; that he tried to sell machines at wholesale; tried to effect an arrangement in New York with other dealers to sell these machines; that he found no wholesale market for these machines after the repudiation of the contract; that he found the retail trade around through the country was using these machines; that he found it impossible where he tried to sell these Dolph Standard washers in large quantities to other machinery manufacturers of laundry machinery; that the Empire Laundry Machinery Company was then in operation, also Oakley & Keiting, of New York, and he thought Layman, in Troy, was selling machines at that time, and also the Troy Laundry Machinery Company; that each manufacturer had a style of machine of their own that they put on the market at retail and called them the best, advertised them as the best, and put them out as their own machines, and that it was impossible for him to have sold these machines in quantities to other laundry machinery manufacturers; that he used all the energy that he could and all the means he had to put the machines on the market at retail, and conducted his business as energetically to that end as he could.

46 Q. What net amount did you realize on the sale of these machines, if you sold any at wholesale or retail, the years 1883, 1884, and 1885?

Defendant's counsel objected to the question as immaterial and incompetent.

The COURT: On what theory?

DEFENDANT'S COUNSEL: On the ground that what amount he realized is immaterial.

The COURT: He may show what he did—what course he took—to make the breach as slight as possible.

Objection overruled. Exception by defendant's counsel.

By Mr. LLOYD:

Q. You have stated that you exerted yourself to sell as many machines as you could after the breach of the contract.

A. Yes, sir.

Q. Did you try to get as high prices as possible?

A. Yes, sir.

Q. What net amount did you realize on these machines after March 1st, 1883?

Objected to by defendant's counsel. Objection overruled. Exception by defendant's counsel.

A. 26 were sold at wholesale; two of them at $75 and the others at an average of $90 each. The amount that I realized at retail I have not computed. It is a matter of computation from testimony I have given as to the number I sold and the average price of them; that the average cost of selling machines was about
47 $35 each; that he estimated the cost in 1885 and 1886; that he thought the cost would be about the same in 1883 and 1884.

Q. Mr. Dolph, do you know what bid was made to the defendant by other manufacturers for the No. 2 washer?

A. Yes, sir.

Q. How much was it for the manufacture of the No. 2 washer?

Objected to by defendant's counsel. Overruled. Exception by defendant's counsel.

A. $105.

Q. For the No. 2 washers?

A. Yes, sir.

Q. Did this defendant company offer you the privilege of making these washers at that bid subsequent to March, 1883?

A. No, sir.

Q. Could you have made them at that price if you had the privilege?

DEFENDANT'S COUNSEL: I object to the question upon the ground that the fact that a single other manufacturer offered to make these machines or did make the machines for a certain sum is not a bid

by manufacturers in open competition under the terms of this contract.

DEFENDANT'S COUNSEL: What manufacturer was it, Mr. Dolph, that bid $105 for these machines?

A. Mr. Tolhurst.

Q. Did you know of your own personal knowledge that he ever made that bid?

A. No; not of my own personal knowledge.

Q. You heard Mr. Angus, upon the last trial, say that he paid Mr. Tolhurst $105 in 1883?

A. Yes, sir.

Q. That is all you know about that?

A. Yes, sir.

DEFENDANT'S COUNSEL: I move to strike out his testimony.

48 THE COURT: The answer may stand.

Exception by defendant's counsel.

By plaintiff's counsel:

Q. Would you have been willing to make these machines at that price during the year 1883?

A. Gladly.

DEFENDANT'S COUNSEL: I object to it as incompetent and immaterial.

Objection overruled. Exception by defendant's counsel.

Plaintiff's counsel:

Q. Will you explain to the jury in regard to the character of these goods, whether they were in general use in households or otherwise, and to what extent they were used, and by what class of persons?

A. They were not in general use in households. They were used for carrying on the business of laundrying or they were used in public institutions—in places where a number of persons were fed and domiciled.

Q. Give an illustration.

A. A lunatic asylum, a seminary, and a hotel; State penitentiary.

Q. Places of that kind?

A. Yes, sir.

Q. Are these goods quoted in market—the prices of these goods quoted in open market?

DEFENDANT'S COUNSEL: I object to the question as immaterial. It is not necessary to make a market price; that things could be quoted in market.

THE COURT: It may be shown.

Exception by defendant's counsel.

A. They are not quoted.

49 By plaintiff's counsel:

Q. Are these goods offered in open public market in any city of the country that you are aware of, as in a horse market or cattle market or stock market?

Defendant's counsel makes the same objection to the question as immaterial and incompetent. Objection overruled. Exception by defendant's counsel.

A. They are not; that machines such as these sold by the defendant and bearing their name plate are not offered in public open market.

Q. Have you ever known of their being offered for sale except by the defendant and its agents?

DEFENDANT'S COUNSEL: I object to the question as immaterial and incompetent.

The COURT: I think it is proper.

DEFENDANT'S COUNSEL: If the court pleases, it appears that he don't know anything on the subject.

By the COURT:

Q. Have you ever known of their being offered for sale except by the defendant and its agents?

A. No, sir; they are not. I was trying to think if I could bring in my mind a case where they were.

Exception by defendant's counsel.

By plaintiff's counsel:

Q. What market had you for these No. 2 Standard Dolph washers after the repudiation of the contract by the defendant; what general market?

A. I had none.

Q. What market had you for them prior to that time?

50 A. Prior to the making of the contract?

Q. Prior to the repudiation of the contract by the Troy Company. After that you say there was none.

By defendant's counsel:

Q. There was no market?

A. No market.

Q. Do you mean you didn't sell any?

A. No, sir; I don't mean that.

DEFENDANT'S COUNSEL: I want to understand that. When a person says there is no market for a thing he means there is no sale for it.

That when he undertook to resume his trade he found the territory occupied which he had formerly occupied, principally by The Troy Company, the defendant in this action; that he immediately set to work to sell as many as he could, and looked after and, he might say, created a market for a few machines; that that state of

affairs continued as to the occupancy of the field by the defendant company to the exclusion of his own goods to the extent of which he spoke up to the present time; that this had relation to other machines than the No. 2 washers. This occupancy of the territory included all the laundry machinery that the defendant company manufactured and sold, and different grades and sizes of machines; that he received no other letter or sworn statement from the Troy Company than the one introduced in evidence, showing the transactions of the year 1882; that he received no statement showing their business transactions and the amount which they were accountable to him for profits except the one for the year 1882.

51 On his cross-examination the witness testified as follows:

That he put up his factory in Cincinnati in 1881 for making laundry machinery; that he made, besides washers, some ironing machines and some starchers, and he did not remember just then all the specific line of articles he made at that time; that he had not sold out his factory; had not sold it to a corporation; that there was an A. M. Dolph Company; that he sold his business to them, he thought, in January, 1884, and they have carried on the business there since; that up to the time he sold out to them he was manufacturing washers, ironers, and starching machines; that he couldn't tell how many ironers and starchers he manufactured in the course of the year; that he couldn't tell how many he sold up to 1884, up to the time he sold out; that he sold ten in each year; he couldn't say whether or not he did 20.

Q. How many washers could you have manufactured and sold—manufactured the same number of starchers and ironers—how many could you have manufactured a year without interfering with your other business?

A. From two to three hundred a year.

Q. Didn't you swear on the former trial that you couldn't manufacture only 150 a year without pushing your machinery?

A. There were different stages of the facilities of my factory.

Q. Did you testify that you could manufacture 150, and that you couldn't manufacture 200 without pushing, and that you couldn't manufacture more than two hundred without adding to your plant?

A. Yes, sir.

Q. That is true?

52 A. It is for the period of which I spoke; that he didn't add to his plant prior to 1884 so that he could have made more than 200, and that since that time he had not manufactured at all for himself; that he had not personally manufactured since that time; that he made and sold other washers besides the Dolph No. 2; that he never obtained bids from any other manufacturers as to these washers, except the number 2, to ascertain what they would make them for; that he never submitted any bids from other manufacturers to the defendants; that the item which made up the cost of his washers, namely, $92.50, in the latter part of 1882 was made up of material, labor, and the proper amount for rent and for packing and for fuel, for furnishing power and attendance on

that, superintendence, and such items as go in to make up the cost of an article in a factory; that he could not say how much of that $92.50 he allowed for material; that he couldn't tell how much he allowed for labor or how much he allowed for rent or how much he allowed for fuel; that he didn't know now the amount of a single item that went to make up the item of $92.50; that the difference of $17.50 in the cost in the latter part of 1882 was from the decrease in the cost of material and labor proportionately to each machine; that he couldn't tell what was the cost of material in the latter part of the year 1882, nor what was the cost of the labor, nor what was the cost of any other item; that in the beginning of 1883, when the cost was $75, he did not know how much the cost of any one item was; that in the latter part of 1883 he could make the machines for $60; that he did not know what made the dif-
53 ference, what the decrease was in the materials in each item, nor what the decrease was in fuel or rent or anything else; that in the year 1884 the average cost was between $50 and $60; that he couldn't at this minute give the amount of either of the items that made up the $50 or $60.

Q. Now, you say that in 1885 and 1886 the cost came down to $46.60?

A. Yes, sir.

Q. Which was just about half of what it was in the beginning of 1882. Now, do you mean to tell me that the price of materials and labor had decreased one-half between 1882 and 1885? Do you mean to say that the materials for a washing machine and the labor employed in making a washing machine was only one-half that it was in 1882?

A. We coupled them together.

Q. That the labor was one-half; you don't mean that you did not pay the same rate of wages?

A. I don't remember about the wages.

Q. What do you mean to say—you reduced the price by your greater facilities and experience?

A. Yes, sir.

Q. That is what you understand?

A. Yes, sir; and the greater number made.

Q. That had a good deal to do with it, didn't it?

A. Yes, sir.

Q. Now, some other manufacturer that in 1882 had just the same facilities and just the same experience that you had in 1885 might have made them in 1882 just as cheaply as you did in 1885, might he not?

A. I don't know that he could.

Q. Do you know that he couldn't?

A. No; I don't know that he couldn't.

54 Q. The price that it would take to make them depended very largely on the facilities of the manufacturer and upon his——

A. And upon the amount of business that he did and the machinery itself.

Q. You said that you heard that Mr. Tolhurst in 1883 made a bid for making these washers for $105. Do you know anything about the facilities that Mr. Tolhurst had for making these machines?

A. I know he had a large shop.

Q. Do you know anything about the facilities he had for making these machines?

A. I don't know of any machinery he had.

Q. Were you ever in his shop?

A. Yes, sir.

Q. When?

A. In 1882.

Q. And you don't know what kind of machinery he used for the purpose of making these particular machines?

A. The general machines—it was lathes and clothes presses.

Q. But you don't know whether his shop was fitted up for the purpose of making these particular shapes or not?

A. No, sir.

Q. You don't know but what he had to do it largely by hand labor, do you?

A. No; I couldn't say.

Q. You don't know but what he did?

A. No, sir.

Q. You don't know but what he was in such a position but what he had to run the same pieces of machines over and over again through the same machinery in order to fit them?

A. I didn't see the machinery he had to make these machines on.

Q. He had a large shop?

A. As I went through it, it was a shop fitted up with modern appliances.

55 Q. Mr. Tolhurst was close by the office of the Troy Laundry Machinery Company, was he not?

A. Yes, sir.

Q. Very convenient for them?

A. Yes, sir.

That he didn't think that he testified on the former trial, in 1883, that he could have made the defendant's No. 2 machine for $50 in 1883; that he thought he could have made them in 1883 for between $50 and $60; that he thought this question was asked him on the former trial: "What would it have cost you to have manufactured these machines during the year 1883, the same machine you have described here, the reversible washer, not the Dolph washer, Standard No. 2," and that he made this answer: "The same machines that they made I think I could have made for $50;" that he now thought that some time during that year he could have made them for $50; that the average cost of selling one of these No. 2 machines was $35; that he estimated that from the actual two years' test of doing it; that the test he made in the two years was that he took what it cost for maintaining the sales of a certain number of machines for two years and took the average price of these machines sold—what he received for these machines during those two years;

that he meant by maintaining the sales keeping the store and having a man to look after it, and all the expenses of it went in toward selling them; that he kept a store in his factory in 1882 and looked after it himself; that his previous answer as to the $35 did not apply to the year 1882; that he had a store in 1883; that if he had sold these fifty machines a year to the defendant he would have had a ware-room in his factory in 1883 and 1884 and 1885 and 1886; that he still had one; that he had another store in
56 Chicago besides that ware-room; that he established his store in Chicago in May, 1885; that up to that time he had no store except at his factory; that he did not think he made the application as to the estimate that he made apply to 1883 and 1884; that he never had a store in Chicago; it is that of the company; that he did not individually or from actual estimate know what it would have cost him to have sold machines in 1885 and 1886, nor how much it would have cost him to have sold a machine at retail in 1883; that he personally did not have a store in Chicago in 1885; that, supposing he had sold fifty machines in Cincinnati in 1885, he couldn't tell how much apiece it would have cost him to have sold them; that he couldn't tell anything about it; couldn't make any definite answer, and that he couldn't tell how much it would have cost him in 1886 to have sold fifty machines in Cincinnati, and that the estimate of $35, that he gave, is upon the assumption that he would have hired a store in Chicago and hired a man to look after it and divided up the expenses by the number of machines sold; that he sent the defendant 14 machines in the latter part of 1883 and they paid for them; that any person doing a large laundry business would find one of these machines desirable, and they are used in hotels and they are used in some steam laundries for doing custom work and in laundries for doing manufactured work, and they are used generally where any large amount of laundry work needs to be done; that he couldn't tell how many of the No. 2 were sold in this country in the course of a year; that there might, perhaps, be a thousand of all kinds of washing machines sold;
57 the number 2 is sold a great deal more than anything else.

On his redirect examination the witness testified:

That he sold out his individual business to the company which bears the name of the A. M. Dolph Company, in January, 1884; the company was formed; that he was the president of the company.

Q. Who remained its general business manager?

Objected to by defendant's counsel as having nothing to do with the case.

The COURT: I assume the question is going to stop there; he may show who was president and manager of the corporation.

Exception by defendant's counsel.

The WITNESS: I was.

That he was in a condition after 1884 to have carried out the pro-

visions of this contract if he had been required so — do; that he did not relax his exertions; that he continued his best efforts to sell after the formation of the stock company, in January, 1884; that the object of opening this store in Chicago in May, 1885, was to increase their business and to occupy some territory that he had lost; that he lost that territory when he entered into this bargain with the Troy Laundry Machinery Company, this written contract which is in dispute in this case; the Troy Laundry Machinery Company to the greatest extent occupied that territory; that it would have cost him more to sell the machines during the year 1885 and 1886 than it cost the company; that it would have cost him individually more than it would have cost the company; that
58 he was pretty positive that he couldn't have sold 50 machines per year in the city of Cincinnati; that he sold in that city all that he could sell there. It was necessary for him to go to Chicago and elsewhere to enlarge his business and facilities for reaching customers; that he had to go where he could find them; that he knew the average cost of manufacturing machines in 1882, because he estimated it at the time from the actual expenditures and cost as he knew them to be at that time; that he had not these items in detail before him now; that with reference to the items of the cost in 1883, 1884, 1885, and 1886 the same remark is true to a certain extent in regard to these years and the manner in which he estimated the cost of production; that he took the actual items of expenditure; that in making this estimate he took the actual items of expenditure and based his calculation on those; that he knew by actual computation—by keeping the cost in a book—that there was a decrease in the cost from the beginning of 1883 to the end of 1883, because at the end of the year they found that they were costing them less; that during the years 1883 and 1884 he did not keep an estimate of the cost of the machines; that he did not have his business so systematized at that time; that he kept the items that entered into the cost, but not in the shape of an estimate; that he kept an account of the expenditures; kept a regular set of books during all these years; that he was able to estimate the cost
59 of the items of the expenditures for each of these years; that there was no break in the general conduct of his business, either in manufacturing or selling, by reason of changing the form of his business from an individual or firm to a corporation in 1884; that the business went right along and has up to this time.

On his recross-examination the witness testified:

Q. Then, Mr. Dolph, when you say that you sold a certain number of machines in 1884 you do not mean that you sold them, but that the A. M. Dolph Company, a corporation, sold them?

A. Yes, sir; that is what I mean.

Q. And the same as to 1885 and 1886?

A. Yes, sir.

DEFENDANT'S COUNSEL: If the court please, I move to strike out

that testimony on the ground that what another party sold, or a corporation, but not this party at all, is no proof of what he would have sold if the contract had been adhered to.

PLAINTIFF'S COUNSEL: He was president and general manager.

The COURT: The evidence may stand.

Exception by defendant's counsel.

By defendant's counsel:

Q. Mr. Dolph, when did you make the estimates that you have given here as to the cost of these machines in 1882, 1883, 1884, 1885, and 1886? When did you make the estimate and come to that conclusion?

A. I made the estimate—the first estimate—before I made the contract or about the time I made the contract with the Troy Company, Limited.

Q. Well, that was $92.50, wasn't it?

A. That was $92.50.

60 Q. When did you make the other estimates—$75, $50, $60, &c.?

A. Our secretary of our company took the items of cost and told me what they were; told me what the machines cost. I didn't do all the clerical work and keep track of all these items; it was a matter of our books.

Q. When did the secretary do that?

A. I don't know the exact time.

Q. Was it before or after the trial of this case last March?

A. Well, I had estimates before and estimates afterward; as a matter of course, we kept track of our goods. He makes estimates, but I know it at the time. We gauge our selling price by the cost of our goods.

Q. Don't you know anything about the cost of these machines except what somebody else has told you?

A. Nothing more than my own officers of the company told me.

DEFENDANT'S COUNSEL: I move to strike out the testimony on the ground that he knows nothing about it.

The COURT: I think the evidence may stand.

Exception by defendant's counsel.

CHARLES ANGUS was sworn for the plaintiff and testified as follows:

Witness said that the name signed to the paper shown him as secretary of the defendant company was his signature; that at that time he was secretary of the defendant company and had been from its organization and continued as such until April, 1886; that at the trial of this case one year ago he was the secretary of the
61 company and was sworn and gave testimony; that the statements here are correct statements from the books of the company showing the sales by the defendant company of washing machines during the years 1883, 1884, 1885, and 1886. They are the same, so far as the years up to 1885 are concerned, as were presented

a year ago, and the one for 1886 was taken off by Mr. Peck and himself a day or so ago.

Q. Mr. Angus, I will ask you to state to the jury the number of No. 2 washers that were sold by the defendant company in the year 1883.

Objected to by defendant's counsel, first, upon the ground that there is no allegation in the petition under which this evidence is admissible; and, second, upon the ground that the machines sold by the defendant after it had repudiated this contract and when it was making all the profits itself are no criterion and are no evidence of what the defendant would have sold if it had been paying the plaintiff a large manufacturer's profit, to commence with, and then dividing with the plaintiff all the profits which it had received from that price.

The COURT: I think he may answer.

Exception by defendant's counsel.

A. (Examining paper.) This is the total number of machines. The special number of two or three that were sold during 1883 is not here.

That these tables furnished a correct statement of the entire number of machines sold, and showed on this detailed statement the number of each kind of machines and the price for which each machine was sold for the years 1883, 1884, 1885, & 1886; that while
62 he was with the company the prices of the machines were similar at the different points of selling; that the prices were similar for the same machines during the same period; that the prices of the machines sold in Chicago corresponded, he thought; that he wasn't sure whether the office in New York was opened in 1883 or 1884; that it was in existence when he left the company; that the Chicago office was in existence when the company was organized, and continued up to the time when his connection with the company ceased; that was during the five years of the contract; that he couldn't give the average price for the No. 1 washer for the year 1886. The average price for the No. 2 washer for 1886 was $100.00.

Q. Did you have regular published agents for the sale of your washing machines during the year 1882?

A. There were regular agents. They published themselves. The Troy Company nor its predecessors never published an agent.

Q. Were these agents in your employ?

A. No, sir.

Q. Who were they?

A. It would be difficult for me to remember them now. The Philadelphia Laundry Machinery Company was an agent. Mr. Gordon was an agent for three months in 1882.

By DEFENDANT'S COUNSEL: I object to this line of testimony upon the ground that there is no allegation in the complaint that we kept any money on these commissions that we had not a right to keep—the commissions as stated in that statement.

By plaintiff's counsel:

Q. On the sworn statement which bears your signature, does it not?

A. Yes, sir.

63 Q. For the transactions of the year 1882 there is a reduction, less commission allowed regularly published agents other than paid employés, of $1,210. I ask you if that amount was actually paid by your company to regular published agents who were not employés receiving wages or salary from your company during that year.

A. Yes, sir; more than that; but we were limited to 20 per cent. and couldn't charge it all up.

Q. Now, are you able to state the bids that you received for the manufacture of the No. 2 washers from other manufacturers in the year 1883?

Objected to by defendant's counsel as immaterial and inadmissible under the pleadings.

The COURT: I think he may state.

Exception by defendant's counsel.

A. I am not able to state.

That he did not know of any other bids from another manufacturer except Mr. Tolhurst; that they received a bid from Mr. Tolhurst, and that his remembrance was that it was $105. That was in the year 1883. Mr. Tolhurst was a manufacturer in Troy, next door to them; that Mr. Tolhurst manufactured only temporarily until they could manufacture for themselves; that he wasn't able to tell how long Mr. Tolhurst manufactured these machines for them upon this offer; that he thought it was about two or three months; that the company manufactured their own washing machines after Mr. Tolhurst ceased to manufacture for them.

Q. Are you able to state the cost to your company of manufacturing these machines in 1883?

64 Objected to by defendant's counsel as immaterial and incompetent; that the cost to the company itself is not evidence of what manufacturers would have bid. Objection overruled. Exception by defendant's counsel.

Q. Are you able to state what it was?

A. No, sir.

That he wasn't able to state the cost of manufacturing in 1884; that in 1883, 1884, 1885, and 1886 the defendant company did not at first have facilities for manufacturing machines; they were gradually acquired; that their facilities commenced as soon as Mr. Tolhurst ceased to manufacture, which was in 1883; that in 1883 they put in one or two machines and commenced with limited facilities; that they had facilities for manufacturing in 1883, 1884, 1885, and 1886.

Q. How did the cost of manufacturing by your company compare with the price paid to Mr. Tolhurst?

A. Well, I never knew the exact figures. Mr. Conkling figured up the cost of the washers, and told me they were making them — less then than Mr. Tolhurst.

Defendant's counsel moved to strike out what Mr. Conkling told him.

(By plaintiff's counsel:)

Q. Mr. Conkling was secretary?

A. Mr. Conkling was the treasurer and kept the books and accounts.

Defendant's counsel renewed the motion to strike out what Mr. Conkling told him.

The COURT: It may stand.

Exeeption by defendant's counsel.

That Mr. Conkling was the officer of the company who had charge of the official books; he was the treasurer; that it
65 was his duty to keep an account of the items of expenditure and the cost of manufacturing; that he believed Mr. Conkling is now connected with the company; he was as long as he was connected with it; that the cost of manufacturing these machines in 1883 could not be ascertained by an examination of the books of the defendant company; that he thought he knew in substance his testimony a year ago as to the cost of manufacturing these machines; that in answer to a question a year ago, "Have you the means of stating what this machine cost you to manufacture, the size corresponding to the Dolph washer, reversible cylinder?" the answer was, "I don't know as I have here what we paid Mr. Tolhurst. When we commenced to manufacture these machines ourselves we figured up the cost as near as we could, and I found that our cost approximated the cost we paid Mr. Tolhurst;" that that answer is correct; it did at first; and that he would make the same answer now that he did then; that in answer to the question on the former trial, "How much did you pay him?" the answer —, "$105;" that this cost to manufacture diminished from that time on; that he couldn't state how rapidly; that he couldn't state the cost of manufacturing the dash-wheels which are stated in the statement and which the defendant continued to make during the years which are stated on the statement here only in a general way; that they cost almost what they got for them. They were expensive machines to make. A dash-wheel is an immense large machine—four or five times as much material and labor as in the hydraulic. It has to be taken down and the men are sent out to set it up. It weighs between three and four thousand pounds. It has to
66 be taken apart to be packed, and then shipped and set up where it is to be used. That he knew of no bids for the manufacture of these machines except from Mr. Tolhurst. His bids were

from $240 to over $300. That they did not offer Mr. Dolph the privilege of making the dash-wheel machines at the same price that was bid by Mr. Tolhurst; that he didn't think they offered Mr. Dolph the privilege of making the number 2 washing machines at the price which was bid by Mr. Tolhurst; that they received no bids for making any machines and made no offers to Mr. Dolph.

On his cross-examination this witness testified as follows:

That Mr. Tolhurst manufactured only two lots of washers; that he thought Mr. Tolhurst made twenty—two lots of ten each; that he believed that was all that he made.

Q. Now, the counsel is constantly using the word bid by Mr. Tolhurst. Was there anything in the nature of a bid in the relations between you and Mr. Tolhurst?

A. Well, the fact of the matter was that the Troy Company were badly off for washers. They had to get a supply of washers, as they had none. They went to Mr. Tolhurst to get washers to supply the demand, and he said, "How much did you pay for them?" and we said, "$110 was the offer from Cincinnati." He said he would make them for $105, and so we told him to make them.

That he made twenty. Mr. Tolhurst had no special facilities for making these machines. He had a saw-bench and a buzz-planer and a surface-planer, and he used to saw the staves and planed the tongues and grooves in them by hand; that that was, of course, a slow and expensive way of making them—much more ex-
67 pensive than to have used the proper machinery and made them in that way. There was considerable hand-work about making these machines by Mr. Tolhurst—that is, as to the wood-work. Mr. Tolhurst manufactured laundry machinery and did experimental work—had a general machine-shop—the iron machinery for the Troy Company; that he made no specialty of laundry machinery, except the dash-wheels; that he had not made any experiments that he knew of before the time nor since they employed him, that he could remember; that the reason the cost diminished considerably after March, 1883, was that the foreman of the shop as he made the machines rigged special appliances to put on the machines and the company bought other machines. They improved their facilities and improved by experience, and made a larger number of machines, and thus brought down the price; that there was a slight decrease in the price of material between 1883, 1885, and 1886. Wages remained about the same and there was less labor; that he thought they always paid the same price for castings; that he had made calculations and found that the average price at which these machines were sold in 1883 was: 11 No. 1 washers at the average price of $106; 107 No. 2 washers, average price of $160; 2 No. 4 washers at the average price of $212. These figures he estimated. He had no data. 1 brass machine at $450; total, 121 washers. In 1884, 6 No. 1 washers at the average price of $106; 262 No. 2 washers at the average price of $119; 9 No. 3 washers at the average price of $212; total, 277 washers. In 1885, 10 No. 1 washers at the average price of $90; 244 No. 2 washers at the average price of $116;

54 No. 3 washers at the average price of $176; 2 brass washers at the average price of $450; total, 310 washers. In 1886, 17
68 No. 1 washers at the average price of $95; 277 No. 2 washers at the average price of $99; 85 No. 3 washers at the average price of $167; 5 Brown washers at the average price of $39; 2 Wendell washers, the price for which he was not able to ascertain; total, 385 washers; that these figures were obtained from actual computation, but he thought there was a little discrepancy as to the number of machines—a very slight difference; that he footed up the total amount of the gross sales covering these periods and obtained $135,879; that the gross sales of washing machines for the year 1883 was $19,160; for the year 1884, $33,722; for the year 1885, $39,608; for the year 1886, $43,389.

On his cross-examination this witness testified as follows:

That the prices that he stated on his direct examination were the best that they could obtain for their washers; that he spoke of the time he was with the company, and that he didn't leave until May, 1886; that besides Mr. Dolph the Empire Laundry Machinery Company, at Chicago and New York and Troy, were in competition with them, and also Oakley and Keiting, of New York city, and the American Laundry Machinery Company, in New York city. The Empire Company became disbanded, and the members each carried on business at different points, and Mr. Layman and Mr. Mahoney were — other companies at Troy; that Mr. Adams, after the break-up of the Empire Laundry Company, carried on the business at Troy himself. He was formerly a member of the defendant company. There was quite a bitter feeling between them, and his competition was
69 formidable, making low prices to cut us down, as much so as he could; that dealers in these machines keep them in stock and sell them. They are kept in the different laundry machinery stores. Those that are dealers and not manufacturers buy them at wholesale and sell them at retail. These stores are principally located in New York city; that he made a rough estimate of the average cost of marketing their machines that were not sold by agents; that their agreement with the agents was that they should have twenty per cent., and they paid a higher commission than that, but the agency ceased and the company opened its own stores; that the company had a store in New York and another in Chicago; that in his judgment the average cost of marketing these machines by the company was from $25 to $20—at least twenty dollars in the latter years; it was $25 earlier, and later it was $20; that the machines stated in the fore part of the statement made by him were furnished by Mr. Dolph; eight were furnished by Mr. Dolph. There are several washers mentioned in the statement, entitled Munger No. 1, Munger No. 2, Munger No. 4, and Munger Brass No. 1, second hand. His recollection was that the Munger machines were put in the statement here at the price named in Mr. Dolph's contract; that, as to the price of those that were not No. 2, he thought Mr. Dolph wrote them a letter. The original price of the No. 4 machine was $400, and he thought that Mr. Dolph wrote them a letter saying that

he considered that price too high, and that, proportionately, $350 would be a better price for it, as compared with the No. 2, or that it cost him a certain sum to make; that was the manufacturer's price, and the selling price is nine-twentieths of whatever the proportion was added to it; that it was stated in one of his letters; that
70 was for Mr. Dolph's No. 4; that they applied the manufacturer's price to the Munger machines the same as the manufacturer's price of the Dolph machines; that they had settled on that basis without any bid from outside parties or anything of that sort.

On his redirect examination this witness testified:

That some of the other competitors that he had spoken of were manufacturing machines in the year 1883, at the time of the breach of this contract; that the Empire Laundry Machinery Company, the American Laundry Machinery Company purchased from them; that Mr. Layman had his manufacturing done by contract for himself; that he didn't know how Mr. Mahoney got his machines; he didn't manufacture them himself; he may have made the castings; that the American Laundry Machinery Company had their particular machines manufactured for them; that each one of these dealers had his own style of machines, with some slight variation from the other; the machines all resembled each other, but they differed mostly in the reversing mechanism; no two of them were exactly alike; that the Empire Laundry Machinery Company sold its own machines; that Mr. Layman sold his own machines; that he thought Mr. Mahoney sold the same machine that was made for or by Mr. Adams; he didn't sell the Empire machine; that Mr. Adams sold him a machine that was almost similar to the Empire; that Mr. Mahoney didn't sell the Empire machine nor the Troy laundry machine, nor the Dolph hydraulic washer; that each one of these had his own line of goods and put them on the market in
71 his own way; that each man preferred to sell his own goods, and that each man kept his own line of goods in stock; that is more particularly true of those who were manufacturers. The dealers did the best they could; that when this contract between the Troy Company and Mr. Dolph, in January, 1882, was entered into Adams, Kelly, and Angus turned over to the new company quite a large amount of machinery, but he couldn't tell of what it was composed, but that the statement here shows that there were 31 Munger washers on hand at the beginning of 1882; that these were bought of the Union Brass Manufacturing Company of Chicago; that he was a stockholder of the defendant company at the time he was its secretary; that now he has no connection with it whatever; that he was a stockholder at its organization and as long as he continued its secretary; Mr. Adams was a stockholder of this company at the time of its organization; he was of the firm of Adams, Kelly, and Angus; and they all retained stock in the defendant company when it was organized; that he commenced to sell his stock soon after it was organized and disposed of it as soon as he could and immediately commenced an independent business—a rival concern.

GEORGE W. GORDON was sworn as a witness for the plaintiff, and testified as follows:

That he resided in Chicago and was in the business of selling laundry machinery, and had been about nine years—since 1878; that prior to that time he was a laundryman; that from about the organization of the defendant company, in 1882, until the 15th
72 of January, 1885, he was the Chicago manager of the Troy Laundry Machinery Company.

Q. Do you know, Mr. Gordon, what bid was made to this defendant company by other manufacturers for the manufacture of the No. 2 washer?

A. At what time?

Q. In 1883.

A. Yes, sir.

Q. What bid was it?

Objected to by defendant's counsel unless it is shown that bids were invited from different manufacturers to bid in open competition with each other. Objection overruled. Exception by defendant's counsel.

Q. How much was the bid?

A. Tolhurst's bid was $105. That the Union Brass Manufacturing Company of Chicago made a bid for the No. 2 Dolph washer of $112, and it was finally put at $110. During the remainder of the year, from the first of March, 1883, when this contract was broken, the average cost of selling the No. 2 Standard washers—the expense of putting them on the market—was about $35. From and after the 1st of March, 1883, there was not a wholesale market that they (laundry machinery men) could find for the Dolph Standard washers No. 2; that he was in actual business selling laundry machinery at that time—at work for the defendant then; that he presumed the machines were sold at retail during that year; they would sell from one to three or four at a time for actual use; that they found the custom by advertising and personal solicitation, going to the individual and soliciting the trade; that the price varied in the year 1883; that he knew at that time that other parties were
73 making laundry machinery throughout the country—the A. M. Dolph Company, the Troy Laundry Machinery Company, A. P. Adams, of Troy, in connection with the Empire Laundry Machinery Company in 1883; they were associated until December, 1883; also J. B. Ellicott, of Chicago, sold some two or three of his own manufacture; that he knew what machines were made by the Empire Company; that they got out a machine practically like the Dolph No. 2 Standard washer; also two other styles of washers that vary some; the one of Mr. Ellicott's was identical with the Dolph machines, except a little difference in the mechanical arrangements for shifting the operation of the cylinder; Ellicott's was made by the Union Brass Manufacturing Company; he was practically an employé of the brass company; that he didn't think it was possible to have sold the Dolph machines in 1883 in large quantities to these

other manufacturers of machines at ordinary prices; that he had experience as a manufacturer, prior to his connection with the Troy Company, in the manufacture of laundry machines, with the No. 2 washers; that his experience was with J. M. Munger and Company, of Chicago; they commenced making machines in 1877; that he superintended the construction of them in the factory and continued with them until the 1st of March, 1881; that the Munger Company was a very large laundry, and they set apart a portion of the room for the manufacture of their washing machines during a portion of this time.

Q. What opportunity had you, while you were an officer of the Troy Company, to know the cost of its machines and the manufacturer's profit customarily realized by it?

A. Well, such opportunities as come with a confidential manager of a branch of their business.

74 Q. You had an opportunity to know the cost?

A. Yes, sir.

Q. And the selling price?

A. Yes, sir.

Q. Are you familiar with the term "manufacturer's profit" so that you know its meaning?

A. Yes, sir.

Q. I ask you what is the usual or average percentage of profit customarily realized by manufacturers of articles similar to the No. 2 Standard washers.

Objected to by defendant's counsel on the ground that it appears that he was with Munger and Company.

Q. What time did you leave Munger and Company?

A. I resigned to take effect on the 1st of March, 1881.

By DEFENDANT'S COUNSEL: It appears he was with Munger & Company in 1881 as superintendent of their manufacturing business. His experience with the Troy Laundry Machinery Company goes for nothing. They were not manufacturers selling to dealers by wholesale. He is not in a position to state.

The COURT: I understand him to say that he is acquainted with the subject.

DEFENDANT'S COUNSEL: Your honor is to judge from the facts which he states as to whether he is sufficiently acquainted with the business to say whether there was an established manufacturer's profit throughout the country from his experience in 1883—from his experience with Mr. Munger in Chicago prior to 1881. The Troy Laundry Machinery Company was not doing business so as to give information on that point.

The COURT: Well, in any capacity he has acquired sufficient knowledge to enable him to speak.

75 Exception by defendant's counsel.

By plaintiff's counsel:

Q. Have you been connected with any other manufacturing com-

pany since you left the employ of the Troy Company, and are you now?

A. I am at present with the Dolph Company.

Q. How long have you been connected with that company?

A. Since the 15th day of April, 1885.

Q. Do you occupy any official position in that company in its board of directors?

A. Yes, sir.

Q. What are you?

A. I am one of the directors of the A. M. Dolph Company.

Q. What duties have you in connection with that company now?

A. I manage the business as carried on in Chicago.

Q. Manager of the Chicago branch?

A. Yes, sir.

Q. Have you ever been in Cincinnati, in the factory?

A. Yes, sir.

Q. Have you ever had any opportunity of inspecting the factory, to go through it?

A. Yes, sir.

Q. Have you had any opportunity of looking at the books or hearing the official reports?

A. Yes, sir.

PLAINTIFF'S COUNSEL: I submit, if the court please, he is qualified to give his opinion.

Objection renewed by defendant's counsel. Objection overruled. Exception by defendant's counsel.

By defendant's counsel:

Q. What position did you hold in Mr. Munger's factory?

A. I was superintendent of the laundry, and when we commenced the manufacture of washing machines originally for our own
76 use I had charge of that.

Q. For your own machines?

A. For the use of Munger's laundry originally.

Q. Munger had a laundry, had he?

A. Yes, sir.

Q. And you remained there until 1881?

A. Yes, sir.

Q. At that time laundry machines were not used extensively throughout the country?

A. No, sir; not then.

Q. It was just the beginning of the business?

A. Yes, sir.

Q. How many laundry machines did Mr. Munger manufacture before you left besides those for his own use?

A. We made ten, and twenty, and fifty. Then we gave the Union Brass Manufacturing Company an order for one hundred.

Q. To make for you?

A. That was to accommodate our outside customers.

Q. Your position in Chicago is that of the manager of the sales of the Dolph Company?

A. Yes, sir.

Q. You have nothing to do with the factory in Cincinnati?

A. No, sir.

Q. He manufactures in Cincinnati?

A. Yes, sir.

Q. Do you know the cost of the machines that he manufactures in Cincinnati?

A. Yes, sir.

Q. How?

A. Well——

Q. Do you know of your own knowledge the cost of the machines that he manufactures in Cincinnati?

A. I do; our books undoubtedly are kept correct.

Q. Have you examined the books for the purpose of ascertaining the cost?

A. Yes, sir; the books and the statement.

Q. What statement?

A. The statements of our treasurer and secretary and also the president.

77 Q. That is what you rely on?

A. Yes, sir.

Q. And you have examined the books yourself?

A. Not into details.

DEFENDANT'S COUNSEL: I object to his giving an opinion as to the general profit on laundry machines in March, 1883.

The COURT: I think he might be better qualified, but I think he may state.

Exception by defendant's counsel.

By plaintiff's counsel:

Q. What is the usual or average percentage of profit customarily realized by manufacturers of washing machines known as the Standard No. 2?

A. I scarcely know how to answer that question.

Q. I will omit from that question the Standard No. 2. What is the manufacturer's profit?

A. Do we have any basis—a standard—for the actual cost of the machine?

Objected to by defendant's counsel upon the ground that there is no proof that either Mr. Munger or the Troy Laundry Machinery Company or the Dolph Company manufactured to sell to dealers to sell again. The proof is that they all manufactured for actual using, and on that ground I make the further objection that he is not competent to give an opinion. Objection overruled. Exception by defendant's counsel.

By plaintiff's counsel:

Q. Of course there was a first cost, Mr. Gordon?

DEFENDANT'S COUNSEL: I don't want the counsel to testify on this point.

78 By plaintiff's counsel:

Q. You have said that you could state the usual or average manufacturer's profit?

—. Assuming that what you term the first cost is the various parts of the machine assembled and put together by mechanics, then I would say the manufacturer is entitled to put an increase on that actual cost from about 60 to 70 per cent.

Q. Is that the usual or average profit?

Defendant's counsel objects to the *answer* and moves to strike it out. Motion denied. Exception by defendant's counsel.

Q. Is that the usual or average profit?

A. Yes, sir.

On his cross-examination this witness testified as follows:

That the circumstances under which this bid from the Union Brass Company was made was that after he received notice from the treasurer of the company that they had ceased to take the Dolph washers he asked him to see how cheaply they could be purchased in Chicago; that upon the receipt of that letter he saw the president of the Union Brass Manufacturing Company, who had formerly made the machines. They had been getting $115; he offered them for $112. That was in 1883. He told him that they had been only paying $110; that he said he would make them at the same price. That embodies all the points of business of that conversation; it is a summary of the conversation that took place between them with regard to the purchase of these machines; that he didn't recollect anything else that was said to him; that he didn't mention
79 how long he wanted him to manufacture them. Nothing was said on the subject of their making them themselves. They were very shy on that subject. They intended to make them themselves.

Q. You said nothing as to the time you wanted them made. You didn't say to him that he was bidding in competition with others; that you were getting bids from other parties?

A. I don't know, really, that I said that.

ALEXANDER M. DOLPH recalled for plaintiff and testified as follows:

Q. What is the usual percentage of profit realized by manufacturers on washing machines?

Objected to by defendant's counsel upon the ground that he is not shown to have any knowledge.

By the COURT:

Q. Have you any knowledge of any machines other than those you have made yourself?

A. No, sir; I have no knowledge of the manufacture of them, because I have only manufactured those that I have made myself.

By plaintiff's counsel:

Q. You do not understand the question of the court. Have you any knowledge of other machines—not that you have made them, but the profit, the cost, and the selling price, etc.?

A. Yes, sir.

Q. You have seen the machines of other dealers?

A. Yes, sir.

Q. You stated yesterday that you had been in the factory of Mr. Tolhurst, did you not?

A. Yes, sir.

Q. Have you ever been in any other large factory?

80 A. My experience goes through a manufacturing line. To give exactly each factory that I have ever been into, I couldn't do that.

Q. More than one?

A. Yes, sir; a great number.

Q. Do you know the Union Brass Company in Chicago?

A. Yes, sir.

Q. Are you able to state the usual percentage of profit——

DEFENDANT'S COUNSEL: I object to that question. You cannot make a man an expert by swearing that he thinks he is. There is no proof that he knows the cost of a machine of a single other manufacturer or the price they received.

By the COURT:

Q. Is there a custom among manufacturers of these machines and similar machines as to the manufacturer's profit?

A. Yes, sir.

Q. And do you know what it is?

A. Yes, sir.

Cross-examination by defendant's counsel:

Q. What other manufacturers do you speak of that make machines of this class?

A. Washing machines?

Q. Yes; machines or laundry machinery.

A. I have not the knowledge of what it cost them in their factory.

Q. Then you don't know what it cost any other manufacturer?

A. Not in their factory.

Q. Then, if you don't know what the cost of a machine would be to another manufacturer, you don't know what his percentage of profit is on the sale, do you?

A. I claim I do, the cost. I don't know it from his computation, but I am a manufacturere, and when I see a piece of machinery analogous to that which I make I know what it would cost to make it.

81 Q. You know what it would cost you, but you don't know what it would cost another?

A. May not exactly. The circumstances may be different.

Q. Then if you don't know the cost to another manufacturer you don't know the percentage of profit that he obtains?

A. Not the profit that he obtains; no, sir.

Q. Now, do you know of any other manufacturer—have you any knowledge of the profit obtained by any other manufacturer who manufactures these machines and sells them to dealers for the purpose of selling again?

A. Not from his computation.

Q. No; from anybody's computation. Do you know of any manufacturer who makes these machines and sells them at wholesale to dealers for the purpose of selling again? Do you know of any manufacturer that does that?

A. I don't know of any now that are making a regular business of it.

Q. Did you ever know of anybody?

A. Yes, sir; I knew of them; not personally acquainted with them.

Q. Nothing about their business?

A. Not the interior of their business.

DEFENDANT'S COUNSEL: I submit that he is incompetent to speak on this point.

The COURT: I don't understand that this is offered for the purpose of establishing a manufacturer's price.

By defendant's counsel:

Q. Do you mean to say that you know that other manufacturers have a customary profit which they add to the cost when they sell to dealers to sell again?

A. I do know it from the knowledge that a man gets from an acquaintance with a specific business.

82 Q. But you say that you don't know of a single manufacturer that manufactures machinery of this character to sell at wholesale to dealers to sell again at retail? You don't know of any such manufacturer as that, do you?

A. Well, I don't know whether some of these machines are for that purpose now or not.

By plaintiff's counsel:

Q. All the manufacturers you know of, so far as you know, manufacture this laundry machinery to sell to actual users?

A. Yes, sir; for their regular business.

Objected to by defendant's counsel as incompetent. Exception by defendant's counsel.

By the court:

Q. How is it that you are able to state, to speak, as to the custom

if there is no instance that the manufacturer sold to a middle man?

A. I claim that a manufacturer in the course of his business acquires a knowledge which he don't know exactly how he acquires; but he does acquire a knowledge to set the price on goods, and the only way he can set the price on goods is to ascertain the cost and add to that the profit that the kind of goods he is making will bear on the market. Of course, if he does it right he makes a success; but if he does not make a success of it he goes out of the business.

By the court:

Q. Has it been done by a large number of manufacturers?

A. It has been and is done.

By plaintiff's counsel:

Q. Constantly?

A. Yes, sir.

83 Q. What class of manufacturers are they?

A. The class of manufacturers that are making machines that are not on the general market as a matter of every-day consumption—specialties, as it were, on the market.

Q. And do you know of any such?

A. I have been in the business in that line.

Q. What kind do you refer to?

A. The specialty in the furniture line.

Q. Was there a custom among men in that line in regard to this subject of a manufacturer's profit? Was there a custom prevailing among them?

Objected to by defendant's counsel. Exception.

A. There was such a custom among furniture men.

Q. Do you know of a rule in regard to any other line of manufacturers?

A. I don't think of any that I can speak of so positively at present.

The COURT: I think this question is competent.

By plaintiff's counsel:

Q. What was the percentage of profit realized by manufacturers on washing machines and similar articles?

Defendant's counsel objected to the question, first, that he is shown affirmatively not to know what the cost and percentage of profit that these machines are to other manufacturers;

Second, that he is shown affirmatively not to know of any manufacturer who makes these machines for the purpose of selling to dealers to be resold; and

84 Third, that it is not the test of the contract in suit; that the test was not the usual or average profit of the manufacturer, but the manufacturer's price was to be settled by bids from other manufacturers in competition with each other.

Objection overruled. Exception by defendant's counsel.

A. Sixty per cent. on first cost—from sixty to sixty-five.

Defendant's counsel asks the court to direct a verdict for the defendant upon the ground that this contract is upon its face an illegal combination for the purpose of raising and keeping up the price of these machines to the public, and therefore the courts will not enforce it.

Motion denied. Exception by defendant's counsel.

Defendant's counsel asks the court to direct a verdict for the plaintiff for nominal damages only, upon these grounds:

First. There is no evidence at all of any manufacturer's price as to the machines made by the defendant, numbers one and three, or as to the dash-wheels made by the defendant. Upon that point there is no evidence at all.

Second. That there is no evidence from which the jury can find what would have been the lowest bid of other manufacturers for making machines other than the No. 2 Standard Dolph.

Third. That there is no evidence from which the jury can say whether or not if such bid had been made the plaintiff would have accepted or refused it.

85 Fourth. That there is no evidence from which the jury can say that the plaintiff would have suffered any damage by reason of the failure of the defendant to order such machines from him.

Fifth. There is no proof that the plaintiff could not have made and sold to other parties the same number of similar machines as the defendant would have ordered at or above such manufacturer's price, and there is no proof that he has suffered damage from the defendant's refusal to order from him.

Sixth. That there being no evidence of what the manufacturer's price of machines other than the Dolph No. 2 would have been, there is no proof of what the seller's price would have been, and therefore no proof of the difference between the manufacturer's and seller's price.

Seventh. That there is no proof in the case as to how many washers the defendants would have sold if, instead of taking all the profits on each sale, it had been compelled to pay the plaintiff a large manufacturer's profit, and to divide the difference between the purchase price and selling price.

Motion denied. Exception by defendant's counsel.

After the counsel had addressed the jury the judge charged the jury as follows:

86 GENTLEMEN OF THE JURY: As the law of this case is somewhat difficult and complicated upon the question of damages, I have deemed it wise and prudent to put in writing the instructions which it is my duty to give.

The action is brought by Alexander M. Dolph against the Troy Laundry Machinery Company, Limited, to recover damages occasioned by the breach of a written contract entered into between the

parties in the spring of 1882 and repudiated by the defendant March 1st, 1882.

I am not familiar with a cause where there is greater difficulty in arriving at a true rule of damages, because of the peculiar stipulations of this contract. There are, however, some general rules applicable to all cases when a contract has been violated to which it is proper to call your attention in the first instance.

Ordinarily the injured party is entitled to recover as damages what he would have realized had the contract been kept. He will be compensated when he has recovered the value of his bargain. The loss of profits is a common measure of damage. What the plaintiff would have made in the future had he been permitted to perform the agreement should be taken into consideration by the jury; and in estimating prospective profits not as affording an absolute rule or measure of damage, but as a guide, as evidence to be considered by them in fixing the amount of future profits. It is by no means conclusive evidence, but it is pertinent to go to the jury in connection with the other facts and circumstances of the
87 case. In this case the profits made by the plaintiff and paid him by the defendant for the year 1882 were $2,071. In all cases the damages sustained should be shown by clear and satisfactory proof; they should not be left to speculation and conjecture. The jury is not permitted to indulge in guess-work upon this question. Profits which the plaintiff would certainly have made but for the defendant's unauthorized action are recoverable, but those which are hypothetical and consequential in character cannot be recovered; they are too remote.

The general rule is that the plaintiff is entitled to all the damages he has sustained by reason of the breach of the contract, as well gains prevented as losses sustained, provided they are certain and such as must be naturally expected to follow from the breach of the contract. They must be the proximate and not the remote consequences of the breach. The parties are deemed to have contemplated only the damages which the plaintiff might suffer from the non-performance of the contract in respect to the particular stipulations which are the subject of it, and not such as may have been incidentally occasioned by the breach in respect to his other affairs. The defendant is not answerable for these, but only such as grow directly from the breach of the contract itself; but profits and advantages which are the direct and immediate fruits of the contract enter into and form part of the contract and are presumed to have been taken into consideration and deliberated upon before the contract was made. The loss of such profits, therefore, constitutes a proper item of damages.

Turning, now, to the contract in question, it will be seen that by by the second clause thereof the defendant agrees to pay
88 to Dolph $110 for each Standard Dolph washer delivered to it by the plaintiff, and agrees to take at least 50 of such machines each year, or 250 in all—186 for the four years after the breach of the contract. The plaintiff was at all times ready and able to furnish these washers, and a much larger number if necessary, and

he has testified that they cost him $92.50 to construct, and that the cost of construction had gradually decreased since then to $75 in 1883 and $60 in 1884, until, in 1885 and 1886, he could make them for about $46.60.

It was further stipulated that the selling price of the Dolph machine should be $200, and the parties agreed that the profit on the sale of each machine should be the difference between $110, the manufacturer's price, and $200, the selling price, which in all cases should be divided between them.

The contract provided also that a discount of 20% might be allowed by either party to their regular established agents. What is the rule of damages as to this branch of the agreement?

To adopt the language of the opinion in this cause delivered upon the motion for a new trial, "The well-settled rule of damages for the breach of an agreement to sell and deliver personal property at a future day is the difference between the contract price and the market value of the property at the time of the delivery called for in the contract. It is quite immaterial whether the article to be delivered is or is not in existence at the time of the contract or whether it is one to be manufactured from time to time as required." * * *

"The plaintiff certainly is not entitled to a larger recovery
89 than he would have been entitled to if he had built all the machines which might have been required to carry out the contract. He might then have stored or retained them for the defendant and sued for the contract price; but if he did not choose to do this and elected to sue for breach of contract to accept them, and, having the machines on hand, could have sold them and realized a larger price than the actual cost of manufacture to himself, it would have been his duty so to do, and his recovery would have been the difference between what he could have realized upon sales and the contract price.

The party who is exposed to loss by the violation of the contract by another must exert himself to make the damages as light as possible. * * * Good faith and good logic require that he be confined to a recovery of those damages only which arise from the fault of the other party."

Regarding the 50 Dolph washers, therefore, you have only to take the contract price, the sum which by the contract the defendant agreed to pay for them, and, having ascertained the market price at the various times when delivery was required under the contract, deduct the market price from the contract price. The plaintiff will be entitled to recover the difference, if any, subject to such qualifications as I shall hereafter state.

In fixing the market price you will take into consideration all the facts and circumstances of the case. What the machines did in fact sell for during the four years succeeding 1882 is, of course, evidence upon this subject; but you have also a right to consider what, if any, depressing effect upon the market the breach of the contract had.

90 You will see that a part of the sum which the defendants agree to pay for the Dolph washer is dependent upon the sale

by them at $200. If they did not sell they were not called upon to pay anything. If they sold they were to pay him one-half of $90, $45; but you are to consider the subsequent decline of the market and say whether they could have sold any machines upon those terms.

Regarding the machines other than the Dolph machines, it is well-nigh impossible to lay down any satisfactory rule of damages. In attempting to do so difficulties and perplexities are encountered at every turn.

At first I was inclined to withdraw this branch of the subject from your consideration entirely, for the reason that the evidence was so uncertain that no damage could properly and certainly be based upon the breach of the contract in this regard; but subsequent reflection has induced me to submit the facts for your consideration, with such instructions as will induce you, if you award anything, to give only such actual damages as you believe the plaintiff has suffered. As was said by the court of appeals in Wakeman *v.* Wheeler & Wilson M'f'g Co., 101 N. Y., 217:

"The safer rule in all such cases is to exclude opinions and receive the facts, and then leave the matter for the determination of the jury. They may not have any certain basis upon which to rest their judgments, but that cannot be helped. They are supposed to be disinterested, and must apply their experience and common sense to the facts proved and reach the best results they can."

91 It was provided by the contract that Dolph should have the option to manufacture all machines sold by the defendant, provided he would agree to do so at a price as low as the lowest bidder after open competition for the work. The defendant also agreed to pay him one-half the profits on the sale of all such machines, which is to be estimated by dividing the manufacturer's price by eleven, multiplying the result by nine, and adding that sum to the manufacturer's price. The sum so obtained is the selling price, and the defendant agreed to divide the difference between the selling price and the manufacturer's price with the plaintiff.

These machines, with a few exceptions, were substantially similar to the Dolph washer, and the plaintiff has testified that he could have made them at a discount of 10 % from the cost of his own machines, which was $92.50 at the time of the contract and gradually decreased to $46.60 in 1885, '6.

No option was given him the first year, and, as there is no way of ascertaining whether if the option had been given thereafter it would have been accepted, it is by no means easy to state what his rights in this respect are. The decision of the court before referred to says upon this branch of the case: "As to the damages recoverable for the breach of that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other washing machines at the lowest price bid by other manufacturers for supplying defendant with the same, it is not clear that the plaintiff could establish any loss of profits, unless it could be shown

that there is some usual or average percentage of profit cus-
92 tomarily realized by manufacturers of analogous articles or some established manufacturer's price. The plaintiff might have been unwilling to act upon the option at prices which other manufacturers would have offered, and the extent of his prospective loss, if any, is largely a matter of speculation. The defendant may have been so situated that it could better afford to employ its own men and facilities, even although by doing so its machines would cost it more than to buy them of others, and in this view the difference between the actual cost of the machines to the defendant and the sum it would have cost the plaintiff to make and furnish them might not be the correct rule of damages."

The defendant by repudiating the contract failed to give the plaintiff the opportunity to manufacture these machines, but did give it to others or manufactured the machines themselves. They paid Tolhurst $105 for a short time and subsequently built the machines themselves for something less than that sum. They also obtained a bid of $110 from the Union Brass Company.

If you should reach the conclusion that there is evidence sufficient to establish an ordinary manufacturer's price and that the plaintiff could and would have built the machines for that price he would be entitled to recover the difference between the contract price and the market price under the rule as previously stated—the difference between what the defendant agreed to pay him and what he could have received for them at any time in the open market.

The selling price of the machines other than the Standard Dolph washer was to be fixed the same in proportion to the desig-
93 nated manufacturer's price as the selling price of the Standard Dolph washer was to its manufacturer's price. The difference between the two was to be divided between the parties.

What has been said heretofore is upon the assumption that the breach of the contract destroyed the plaintiff's business and left him practically without employment for himself and his manufactory. If, however, he continued to manufacture and sell as advantageously as if the contract had been fulfilled, it is quite clear that he has suffered no damage. The law does not permit him to sit down and fold his hands and make no effort to find occupation for himself and his machinery, and you should consider, in fixing the amount of the damage to the plaintiff, the profits which he has made by reason of being released from this contract.

It is entirely clear that from the profits which he was to receive from the defendant should be deducted the profits which they were entitled to receive from him. The balance is all he would be entitled to recover. If each sold the same number of machines there would, of course, be no balance either way.

The plaintiff has testified that he sold during the years 1883, '4, '5, '6, 55, 44, 93, 156 machines, respectively. During the same years the defendant sold 121, 277, 310, 385, respectively, including dash-wheel machines.

In all that has been said thus far it has been assumed that the prices stipulated in the contract were to continue till its expiration. But the contract provides for the reduction of prices, showing that that contingency was in the minds of the parties when the
94 agreement was made. It has been proved that the price of manufacture decreased from $92.50 to $46.60, and that the average market price gradually decreased from $200 down to as low as $99 in 1886. You have, therefore, a right to conclude that had the contract remained in force the competition would have been such that the parties would have lost the chance to sell any machines at all had they adhered to the stipulated price of two hundred dollars, or, what is more probable, that they would have done what common sense and self-interest dictated—reduced the prices to meet the demands of the market. In either event, of course, the profits would have been much reduced on each machine. It would be unfair to charge the defendant with the profit stipulated in the contract on the machines sold when the proof makes it quite clear that they could have sold none of the machines which they did sell after 1882 unless they had largely reduced the price. At least, it is for you to say, in view of the falling market, whether they could have maintained the selling price at $200.

The contract and statements of sales by both parties will be submitted to you. You can carry them to your room and examine them at your leisure.

The question of damages is with you. It is a question peculiarly within the province of the jury.

Do not permit your action to be influenced by any considerations of sympathy or prejudice, but upon the whole case render a verdict which, in your judgment, will recompense the plaintiff for the actual damages he has sustained—a verdict which shall be in accordance with good judgment and sound common sense.

95 *Defendant's Requests to Charge.*

1. That there is no evidence from which the jury can find what would have been the lowest bid of other manufacturers for making machines similar to the No. 2 Standard Dolph.

The COURT: That I decline except as already charged. There was no bid except by Tolhurst and by the Union Brass Company.

Exception by defendant's counsel.

2. There is no evidence from which the jury can say whether or not if said bid had been made the plaintiff would have accepted or refused it.

The COURT: That I decline except as I have already charged upon that subject.

Exception by defendant's counsel.

3. That there is no evidence from which the jury can say that the

plaintiff would have suffered any damage by reason of the failure of the defendant to order such machines from him.

The COURT: That I decline to charge.

Exception by defendant's counsel.

4. That if the plaintiff could have made and sold to other parties the same number of similar machines as the defendant would have ordered at or about such manufacturer's price he has suffered no damage from the defendant's refusal to order of him.

The COURT: I so said and I so say.

96 5. That, there being no evidence of what the manufacturer's price for machines other than the Dolph No. 2 would have been, there is no proof of what the seller's price would have been, and therefore no proof of the difference between the manufacturer's and selling price.

The COURT: I decline except as charged, saying, however, that if you find that there is no proof of the manufacturer's price, then there is no means of determining what the seller's price would be except as to the Dolph washer. The amount that is to be divided is the difference between the established seller's price and the established manufacturer's price, and, of course, there being no established manufacturer's price there is no basis upon which to fix the seller's price.

Exception by defendant's counsel.

6. That there is no proof in the case as to how many washers the defendant would have sold if instead of taking all the profits of each sale it has been compelled to pay the plaintiff a large manufacturer's profit and to divide the difference between the purchase price and selling price.

The COURT: I so charge.

7. That the jury are not justified in finding that the defendant would have sold machines at a loss or without adequate profit.

The COURT: I decline to so charge. It is a question for the jury.

Exception by defendant's counsel.

8. That, other things being equal, they should find that the party who made the largest profit at the same selling price would sell the most machines.

97 The COURT: I decline that also, saying it is a question for you gentlemen to determine.

Exception by defendant's counsel.

9. That, the manufacturer's and seller's price remaining the same as in contract, the defendant could not have sold machines at a profit after March, 1883.

The COURT: I have already said that that was a question for you to determine.

10. That the jury have no right to presume that the selling price could be modified unless it was for the interest of both parties.

The COURT: I so charge.

11. That they have no right to presume that the selling price would have been modified by consent unless it was more for the interest of both parties to modify it than to adhere to the contract.

The COURT: I decline except as charged.

Exception by defendant's counsel.

12. That the parties had as much right to charge the manufacturer's price as the seller's price by consent, and the jury have as much right to presume one modification as the other.

The COURT: That I charge.

13. If the jury are satisfied that even if the selling price had been changed to meet the falling market the defendants could then have sold only at a loss or with an inadequate profit the actual sales of the parties since the contract was broken are no evidence of what they would have been had such contract been adhered to.

98 The COURT: I decline except as I have charged.

Exception by defendant's counsel.

14. That there is no satisfactory proof in this case of what the sales of either party would have been if the contract had not been broken.

The COURT: I decline except as charged.

Exception by defendant's counsel.

15. That if the jury find damages for refusal to take the fifty machines a year and at the same time find that it would have been for the interest of the defendant to quit selling and yield the market to the plaintiff, and that the sum finally due from the plaintiff to the defendant on a division of profits would be more than the damages for failure to take the fifty machines, they could only find a verdict for nominal damages.

The COURT: I decline that except as I have already charged.

Exception by defendant's counsel.

16. That as to the machines sold by the defendant, other than the No. 2 washer, there is no evidence of any bid by other manufacturers or of the cost of the machines, and therefore no evidence of a manufacturer's price or a selling price for such machines, and the jury can give no damages in respect to such machines.

The COURT: I so charge.

17. That there was no provision in the contract for fixing the manufacturing price but once. That would have been at least $105 in March, 1883.

The COURT: I so charge.

99 Mr. STEDMAN: We except to the refusal of the court to give the charges requested by the plaintiff and refused by the court.

We except to that portion of the charge regarding the "fifty Dolph washers" and that which follows in its immediate connection, together with the extract from the opinion of Judge Wallace in regard to the market price which was incorporated with the charge.

We except to that portion of the charge commencing "I was at first inclined to withdraw this branch of the case from the consideration of the jury," and that portion which follows in this immediate connection.

We except to that portion of the charge commencing "As to the damages recoverable," and the words following quoted from Judge Wallace's opinion.

We except to that portion of the charge beginning "It would be unfair to the defendant to estimate the profits," and that portion which follows in this immediate connection.

We except to that portion of the charge commencing, in substance, If he, plaintiff, continued to make and sell as before the contract he has suffered no loss.

We except to that portion of the charge in which the court states, in substance, that there is no reason to know that plaintiff would have accepted the option, and words in that immediate connection.

We except to all the charges requested by defendant and given by the court.

100 Mr. COWEN: I except to the plaintiff's requests which were charged by the court, and I also except to the refusal of the requests to charge which were made by me and refused by the court.

I except to that portion of the charge of the court that the jury may, under the circumstances of this case, consider the profits paid by the defendant in 1882 as evidence of the profits that would be paid afterwards.

I except to the submission of the question of substantial damages to the jury, except as to the failure to take the fifty washers.

I except to that portion of the charge where the court tells the jury that they may presume that the parties would have altered the seller's price of the machines by mutual consent.

In view of the charge of the court that they had the same right to alter the manufacturer's price as the selling price, I submit that there can be no basis for definite or certain damages except as to the failure to take the fifty machines, and I except to the submission of the question of damages to the jury on the other branch of the case.

The jury here come into court and, being called, answer and say they find a verdict for the plaintiff in the sum of $7,208.

The foregoing bill of exceptions is settled & agreed upon by the attorneys for the respective parties this 10th day of August, 1887.

G. L. STEDMAN,
Pl'ff's Att'y.

ESEK COWEN,
Def't's Att'y.

101 And now, because none of the said exceptions, offers, requests, or decisions so offered, made, and excepted to as aforesaid to the rulings, opinions, and decisions of the said judge do appear upon the record of said trial, therefore, on the prayer of the said defendant, by its said counsel, the judge, Hon. A. C. Coxe, hath to this bill of exceptions set his hand and seal, according to the statute and the rules and practice of this court in such case made and provided, this 15th day of September, one thousand eight hundred and eighty-seven.

ALFRED C. COXE. [L. S.]

(Indorsed:) Bill of exceptions. Filed Sept. 15, 1887.

102 *Opinion.*

United States Circuit Court, Northern District of New York.

DOLPH
vs.
THE TROY LAUNDRY MACHINERY COMPANY.

Motion for a new trial before Wallace and Coxe, JJ.

WALLACE, *J.:*

The motion by the defendant for a new trial raises the questions whether the contract in suit was void, as one in restraint of trade, and whether the correct rule of damages was given by the judge in his instructions to the jury.

The facts, so far as they are necessary to the consideration of these questions, may be briefly stated. The parties were competitors in the business of manufacturing and selling washing machines throughout the United States, the plaintiff's place of business being at Cincinnati and the defendant's at Troy. They were the principal, but not the only, manufacturers in this country. In January, 1882, in order to obviate the consequences of competition with each other and secure better prices and better profits, they entered into an agreement to divide the profits on all sales made by each upon the basis of a fixed manufacturer's price and selling price upon machines during the term of five years. Among other things, by the terms of the contract (1) the plaintiff promised to deliver
103 to the defendant such "Dolph Standard" machines as the latter should order from time to time at the price of $110 each, and the defendant promised to take at least fifty of such machines in each year, and (2) the plaintiff was to have the option of manufacturing all machines sold by both parties at the price of $110 each for the "Dolph Standard" machine and at such prices for other machines as might be bid for them in open competition by any other responsible manufacturer for equal quality of goods. After the parties had proceeded under the contract for one year the defendant terminated it by notice to the plaintiff. During the remaining four years of the contract both parties sold many of the

"Dolph Standard" machines at prices ranging from $110 to $175 each. During these years the plaintiff was ready and willing to comply with the provisions of the contract. The evidence was that during these four years the plaintiff could have manufactured the machines at a cost to himself of from $45.00 to $92.50 each, and the price paid by defendant to other manufacturers and the cost of manufacturing them when made by the defendant was about $105 each. The judge denied an instruction requested for the defendant that the contract was void, as being one in restraint of trade. Upon the question of damages he instructed the jury that the plaintiff was entitled to recover what he would have realized had the contract been performed, taking into consideration what he would have made in the future if he had been permitted to carry it out, as well gains prevented as losses sustained, provided they were certain and such as naturally followed from the breach of the contract. Referring to the fifty Dolph Standard washers which the defendant
104 had agreed to take for each of the four remaining years of the contract, he instructed the jury that the plaintiff was at all times ready and willing to furnish these machines and could have done so at a cost to himself varying from $45.00 to $92.50 each, and by doing so would have made a profit consisting of the difference between the cost and $110, the contract price. Respecting the other machines he instructed the jury that the plaintiff was entitled to recover the difference between the price the defendant paid other manufacturers for such machines or the cost of the machines to the defendant when manufactured by itself and the sum for which the plaintiff could have manufactured them. He refused to instruct the jury, as requested by the defendant, that the rule of damages was the difference between the contract price and the market value of the machines at the times at which they were to have been delivered. Exceptions were taken by the defendant to the instructions given and to the refusal to instruct as requested.

Assuming that in entering into the contract the parties contemplated that the defendant should cease manufacturing machines and buy all its machines from the plaintiff, and that the only purpose in view was to promote the interests of the parties and enable them to obtain from customers higher prices for the machines, it is not obvious how such a contract contravenes any principle of public policy. Washing machines, although articles of convenience, are not articles of necessity. The scheme of the parties did not contemplate suppressing the manufacture or sale of machines by others. Those who might be unwilling to pay the prices asked by the
105 parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exorbitant prices for their machines. It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods and a division of their profits. It is not obnoxious to good morals or to the rights of the public that two rival traders

agree to consolidate their concerns, and that one shall discontinue business and become a partner with the other for a specified term. It may happen as the result of such an arrangement that the public have to pay more for the commodities in which the parties deal, but the public are not obliged to buy of them. Certainly the public have no right to complain so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly. It is hardly necessary to cite authority in support of these propositions; but if any is needed enough will be found in the opinions in the cases, Jones *vs.* Lees, 1 H. & M., 189; Ainsworth *vs.* Bentley, 14 W. R., 630; Marsh *vs.* Russell, 60 N. Y., 292, and Perkins *vs.* Lyman, 9 Mass., 122. As is stated by Mr. Pollock (Principles of Contract) "public policy requires on the one hand that a man shall not by contract deprive himself or the State of his labor, skill, or talent, and, on the other hand, that he shall be able to preclude himself from competing with particular persons, so far as necessary, to obtain the best price for his business or knowledge when he chooses to sell it."

106 Upon the question of damages the effect of the instructions given and those refused was to direct the jury that the measure of damages for the breach of the contract was the difference between the contract price and the price which it would have cost the plaintiff to make and deliver the machines, irrespective of the market value of the machines, during the period of the contract. The general instruction with which the judge prefaced his directions to the jury, that the plaintiff was entitled to recover as damages what he would have realized had the contract been performed, including as well gains prevented as losses sustained, was undoubtedly a correct statement of the law. One of the most recent cases in which it was reiterated is United States *vs.* Behan, 110 U. S., 338. It was there held that where one party enters upon the performance of a contract and incurs expense therein, and, being willing to perform, is, without fault of his own prevented by the other party from performing, his loss will consist of two distinct items of damages—first, his outlay and expenses less the value of materials on hand, and, secondly, the profits he might have realized by performance. In applying this rule to the facts of the particular case, the courts have sometimes used language which is liable to misconception if understood to be the rule which ordinarily applies in the case of a contract for the future delivery of articles which have a market value. Thus, in the leading case of Masterson *vs.* The Mayor, the language of the syllabus is: "The measure of damages in respect to so

107 much of the contract as remains wholly unperformed is the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay." See also the language of Curtis, J., in Philadelphia, Baltimore & Wilmington R. R. Co. *vs.* Howard, 13 How., 344. The error of the instructions in the present case consists in adopting these expressions literally and applying them to a case where the difference between the cost price and the contract price would exceed the plaintiff's actual prospective loss and allow him more than complete indemnity for

the breach of the contract by the defendant. In the cases where damages have been sanctioned upon the basis of the difference between the contract price and the actual cost to the plaintiff of performance of the contract, there was no other criterion for ascertaining the extent of the plaintiff's prospective loss. Thus in Masterton *vs.* The Mayor the contract was for furnishing marble cut, fitted, and prepared for a particular building, and in Story *vs.* N. Y. & Harlem R. Co., 6 N. Y., 85, the contract was for building the roadway of a railroad; and it is to be observed that in both of these cases the cost of performing the contract, which was allowed as the basis of damages, was not the cost to the plaintiff personally, but the reasonable cost of doing what was done by him, and he was not allowed to recover the difference between the contract price and subcontracts made by him with others for doing the same work. In Elbidger *vs.* Armstrong, 9 Q. B. (L. R.), 473, the court say: "When from the nature of the article there is no market in which it can be obtained, this rule (the difference between the contract and market value) is not applicable."

108 The well-settled rule of damages for the breach of an agreement to sell and deliver personal property at a future day is the difference between the contract price and the market value of the property at the time of the delivery called for by the contract. It is quite immaterial whether the article to be delivered is or is not in existence at the time of the contract or whether it is one to be manufactured from time to time as required. This is specifically pointed out in Masterton *vs.* The Mayor, where Beardsley, J., says: "In reason and justice there can be no difference between damages which should be recovered for the breach of an ordinary agreement to buy or sell goods and one to procure materials, fit them for use and deliver them in a finished state at a stipulated price." In Rhodes *vs.* Cleveland Rolling Mill, 17 Fed. Rep., 426, the contract was for the delivery of pig metal to be manufactured, and, the defendant having refused to proceed with the contract, it was held that the plaintiff's damages ordinarily would be the difference between the market price and the contract price at the time defendant refused to go on with the contract, but that plaintiff having tendered the iron after notice that the defendant would not accept, and the price having advanced between the time of notice and the time of the tender, the plaintiff could only recover the difference between the contract price and the price at the time of the tender. See also McNaughter *vs.* Cassally, 4 McLean, 531.

The plaintiff certainly was not entitled to a larger recovery than he would have been entitled to if he had built all the machines which might have been required to carry out the contract.

109 He might then have stored or retained them for the defendant and sued for the contract price, but if he did not choose to do this and elected to sue for breach of contract to accept them, and having the machines on hand could have sold them and realized a larger price than the actual cost of manufacture to himself, it would have been his duty to do so, and his recovery would have been the difference between what he could have realized upon sales

and the contract price. The party who is exposed to loss by the violation of the contract by another party must exert himself to make the damages as light as possible; the law imposes this active duty upon him. Costigan *vs.* The M. & H. R. R. Co., 2 Denio, 609; Hamilton *vs.* McPherson, 28 N. Y., 72; Dillon *vs.* Anderson, 48 N. Y., 231; Warren *vs.* Stoddart, 105 U. S., 229. Good faith and good logic require that he be confined to a recovery of those damages only which arise from the fault of the other party. What has been said has reference to the instructions respecting the damages recoverable by the plaintiff for the breach of that part of the contract relating to the Dolph Standard machines. It is apparent that under the instructions given the jury may have awarded the plaintiff damages in excess of the difference between the market price or value of the machines at the time when their acceptance was called for under the contract and the contract price. The evidence that both the plaintiff and defendant were selling the machines in open market during the whole term of the contract and the prices at which the machines were sold authorized the jury to fix the market value. As to the damages recoverable for the breach of that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other
110 washing machines at the lowest price bid by other manufacturers for supplying defendant with the same, it is not clear that the plaintiff could establish any loss of profits unless it could be shown that there is some usual or average percentage of profit customarily realized by manufacturers of analogous articles or some established manufacturer's price. The plaintiff might have been unwilling to act upon the option at prices which other manufacturers would have offered, and the extent of his prospective loss, if any, is largely a matter of speculation. The defendant may have been so situated that it could better afford to employ its own men and facilities, even although by doing so its machines would cost it more than to buy them of others, and in this view the difference between the actual cost of the machines to the defendant and the sum it would have cost the plaintiff to make and furnish them might not be the correct rule of damages. In any view the jury were unduly restricted by the direction that the plaintiff was entitled to receive as his loss under this provision of the contract the difference between what it cost the defendant to build them and what the plaintiff could have built them for. At most the cost to the defendant was only evidence to be considered with the other evidence of the ordinary manufacturer's price for such machines.

For these reasons it must be held that the instructions to the jury on the question of damages were erroneous and prejudicial to the defendant.

A new trial is granted.

Coxe, J., concurred.

(Indorsed): Opinion, Wallace, J. Filed September 8, 1886.

111 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Alexander M. Dolph, plaintiff, and The Troy Laundry Machinery Company, Limited, defendant, manifest error hath happened, to the great damage of the said The Troy Laundry Machinery Company, Limited, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the said The Troy Laundry Machinery Company, Limited, aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that we may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

112 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of May, in the year of our Lord one thousand eight hundred — eighty-seven.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

Allowed by—
ALFRED C. COXE.

[Endorsed:] U. S. Supreme Court. The Troy Laundry Machinery Company (Limited), pl'ff in error, *vs.* Alexander M. Dolph, def't in error. Writ of error. Esek Cowen, att'y for pl'ff in error.

113 *Bond.*

United States Circuit Court, Northern District of New York.

THE TROY LAUNDRY MACHINERY COMPANY, Limited, Plaintiff in Error,
against
ALEXANDER M. DOLPH, Defendant in Error.

Know all men by these presents that we, Jacob H. Ten Eyck, of Albany, N. Y., and Delavan Peck, of Albany, N. Y., are held and firmly bound unto Alexander M. Dolph in the full and just sum of

fifteen thousand dollars, to be paid to the said Alexander M. Dolph or his certain attorney, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a stated term of the said circuit court of the United States for the northern district of New York, in a suit pending in said court between Alexander M. Dolph, plaintiff, and The Troy Laundry Machinery Company, Limited, defendant, final judgment was rendered against the said The Troy Laundry Machinery Company, Limited, and the said The Troy Laundry Machinery Company, Limited, being about to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation being about to issue, directed to the said
114 Alexander M. Dolph, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Troy Laundry Machinery Company, Limited, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

J. H. TEN EYCK. [L. S.]
DELAVAN PECK. [L. S.]

Sealed and delivered in the presence of—
WALTER E. WARD.

UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

Jacob H. Ten Eyck and Delavan Peck, being duly sworn, each for himself deposes and says that he is a resident and freeholder within the said northern district of New York, and is worth the sum of thirty thousand dollars over and above all just debts and liabilities which he owes or has incurred and besides property exempt by law from execution.

J. H. TEN EYCK.
DELAVAN PECK.

Severally sworn to before me this 23rd day of April, 1887.
WALTER E. WARD,
[L. S.] *Notary Public, Albany Co., N. Y.*

I approve of the within bond and the sureties thereto.
ALFRED C. COXE.

115 (Indorsed:) United States circuit court, northern district of New York. The Troy Laundry Machinery Company, Limited, plaintiff in error, against Alexander M. Dolph, defendant in error. Bond. Filed May 24, 1887. W. S. Doolittle, clerk.

116 *Citation.*

The United States of America to Alexander M. Dolph, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein The Troy Laundry Machinery Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

ALFRED C. COXE.

Due service of the above admitted May 23, 1887.

G. L. STEDMAN,
Att'y for Def't in Error.

(Indorsed:) Citation. Filed May 24th, 1887. W. S. Doolittle, clerk.

117 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 116, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Alexander M. Dolph *vs.* The Troy Laundry Machinery Company, Limited, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this 23d day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and twelfth.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

118 United States Supreme Court.

THE TROY LAUNDRY MACHINERY COMPANY, Plaintiff in Error,
ag'st
ALEXANDER M. DOLPH, Defendant in Error.

And now comes the plaintiff in error, by Esek Cowen, its attor-

ney, and says that in the record of the proceedings herein there is manifest error in this, to wit:

First. The court erred in admitting hearsay testimony from the plaintiff as to the amount for which Tolhurst had offered to make the machines.

Second. The court erred in permitting the plaintiff to testify that he would have been willing to make the No. 2 machines in the year 1883 at $105 each.

Third. The court erred in permitting the plaintiff to state the number of machines sold by a corporation to which the plaintiff had transferred his business as evidence of what he would have sold had he retained the business, and in refusing to strike out such evidence on the motion of the defendant.

Fourth. The court erred in permitting the plaintiff to testify as to the cost of machines in the years 1884, 1885, and 1886,
119 when he had no knowledge of their cost except as informed by the officers of the corporation which had purchased his business, and in refusing to strike out such testimony on motion of the defendant.

Fifth. The court erred in permitting the witness, Charles Angus, to testify as to the number of washers sold by the defendant in the years 1883, 1884, 1885, and 1886 as evidence of the number that it would have sold if the contract had been adhered to by both parties.

Sixth. The court erred in refusing to strike out the testimony of the witness, Charles Angus, as to what Mr. Conkling, the secretary of the company, had told him.

Seventh. The court erred in permitting the witness, George W. Gordon, to testify to the offers made by the Union Brass Company and by Tolhurst to make this machine for the defendant.

Eighth. The court erred in permitting said witness Gordon to testify to the usual or average percentage of profit customarily realized by manufacturers of articles similar to the No. 2 Standard washer and in refusing to strike out such testimony.

Ninth. The court erred in permitting the plaintiff to testify as to the usual and customary profit of manufacturers making similar machines.

120 Tenth. The court erred in refusing to direct a verdict for nominal damages upon the several grounds stated by the defendant at the close of the evidence.

Eleventh. The court erred in charging the jury that they might consider the profits made by the defendant in the year 1882 as evidence of the profits that the defendant would have made in subsequent years if the contract had not been broken.

Twelfth. The court erred in submitting to the jury the question of damages as to any breach of the contract except the failure to accept the fifty machines each year.

Thirteenth. The court erred in charging the jury that they might presume that the parties would have altered the seller's price of the machines by mutual consent, and that they might award damages upon the basis of such supposititious agreement.

Fourteenth. The court erred in refusing to charge the defendant's

first request, to wit, that there was no evidence from which the jury could find what would have been the lowest bid of other manufacturers for making machines similar to the No. 2 Standard Dolph.

Fifteenth. The court erred in refusing to charge the defendant's second request, to wit, that there was no evidence from which
121 the jury could say whether or not the plaintiff would have accepted such bid if it had been made.

Sixteenth. The court erred in refusing to charge the defendant's third request, to wit, that there is no evidence from which the jury could say that the plaintiff would have suffered any damage by reason of the failure of the defendant to order such machines from him.

Seventeenth. The court erred in refusing to charge the defendant's seventh request, to wit, that the jury were not justified in finding that the defendant would have sold machines at a loss or without adequate profit.

Eighteenth. The court erred in refusing to charge the defendant's ninth request, to wit, that, the manufacturer's and seller's price remaining the same as in the contract, the defendant could not have sold machines at a profit after March, 1883.

Nineteenth. The court erred in refusing to charge the defendant's eleventh request, to wit, that the jury had no right to presume that the selling price would have been modified by consent, unless it was more for the interest of both parties to modify than to adhere.

Twentieth. The court erred in refusing to charge the thirteenth request of the defendant, to wit, that even if the selling price had been changed to meet the falling market the defendant
122 could then have sold only at a loss or with an inadequate profit. The actual sales of the parties since the contract was broken are no evidence of what they would have been if the contract had been adhered to.

Twenty-first. The court erred in refusing to charge the defendant's fifteenth request, to wit, that if the jury found damages for the defendant's refusal to take the fifty machines a year, and found at the same time that it would have been for the interest of the defendant to quit selling and yield the market to the plaintiff, and that the sum finally due from the plaintiff to the defendant on a division of profit would be more than the damages for failure to take the fifty machines yearly, then they could only find a verdict for nominal damages.

Wherefore it prays that the judgment herein may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of such judgment.

ESEK COWEN,
Attorney for Plaintiff in Error.

123 [Endorsed:] United States Supreme Court. The Troy Laundry Machinery Company, pl'ff in error, ag'st Alexander M. Dolph, def't in error. Assignment of errors. Esek Cowen, att'y for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due & personal service of a copy of the within is admitted this 12th day of Sept., 1887. G. L. Stedman, def't's att'y.

124 Supreme Court of the United States.

THE TROY LAUNDRY MACHINERY COMPANY, Limited, Plaintiff in Error,
against
ALEXANDER M. DOLPH, Defendant in Error.

And afterwards, to wit, on the second Monday of October, in the year 1887, the said defendant in error, by George L. Stedman, his attorney, freely comes into court and says that there is no error in the record or proceedings aforesaid or in the giving of judgment aforesaid, and he prays that the said Supreme Court of judicature, before a justice thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed.

GEORGE L. STEDMAN,
Attorney for Defendant in Error, Albany, N. Y.

Endorsed on cover: N. New York C. C. U. S. No. 149. The Troy Laundry Machinery Company, Limited, plaintiff in error, *vs.* Alexander M. Dolph. Filed October 6, 1887.

SUPPLEMENT TO THE RECORD.

THE TROY LAUNDRY MACHINERY COMPANY (LIMITED),
Plaintiff in Error,

vs.

ALEXANDER M DOLPH,
Defendant in Error.

It is hereby stipulated and agreed that the statement or tables used by the witness Angus of the entire number of machines sold in the years 1883, 1884, 1885 and 1886, be printed and attached as a supplement to the record of this case in the U. S. Supreme Court.

EZEK COWEN,
Counsel for Plaintiff in Error.

H. P. LLOYD,
Counsel for Defendant in Error.

The statements referred to by Charles Angus, on page 32 of the record, are as follows:

1883.

11	No. 1 Washers, Average price,	$106	$ 1166.00
107	No. 2 Washers, Average price,	160	17120.00
2	No. 4 Washers, Average price, (est)	$212	424.00
1	Brass Washer, Average price,	$450	450.00
121			$19160.00

1884.

6	No. 1 Washers, Average price,	$106	$ 636.00
262	No. 2 Washers, Average price,	119	31178.00
9	No. 3 Washers, Average price,	212	1908.00
277			$33722.00

1885.

10	No. 1 Washers, Average price, (est).	$ 90	$ 900.00
244	No. 2 Washers, Average price,	$116	28304.00
54	No. 3 Washers, Average price,	176	9504 00
2	Brass Washers, Average price,	450	900.00
310			$39608.00

1886.

17	No. 1 Washers, Average price,	$ 95	$ 1615.00
277	No. 2 Washers, Average price,	99	27423.00
85	No. 3 Washers, Average price,	167	14195.00
4	No. 5 Brown Washers, Average price,	$ 39	156 00
2	Wendell Washers, Average price,		
385			$43389.00

Grand total, $135879.00

Supreme Court U. S.
FILED
DEC 9 1899
JAMES H. McKENNEY,

Supreme Court of the United States.

TROY LAUNDRY MACHINERY COMPANY, LIMITED,
Plaintiff in Error,

against

ALEXANDER M. DOLPH,
Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

ESIK COWEN,
Of Counsel for Plaintiff in Error.

Evening Post Job Print, New York.

Supreme Court of the United States.

TROY LAUNDRY MACHINERY COMPANY, LIMITED,
Plaintiff in Error,

AGAINST

ALEXANDER M. DOLPH,
Defendant in Error.

This is a writ of error directed to the Supreme Court, Northern District of New York, for the purpose of reviewing a judgment of that Court, in favor of the defendant in error, for the sum of $7,208 damages, with costs, for the violation of a certain contract, to divide profits, which is hereinafter set forth.

Statement of Facts.

The Troy Laundry Machinery Company, Limited, is a corporation organized under the laws of the State of New York, and doing business at the City of Troy, in that State.

Its business is the manufacture and sale of all kinds of machines for use in laundries, such as washing machines, ironing machines, &c.

The defendant in error, Alexander M. Dolph, in 1881 and 1882, was engaged in the same business, in the City of Cincinnati, in the State of Ohio.

On January 3, 1882, the parties entered into an agreement, which will be found on pages 1, 2 and 3 of the printed record.

This agreement was substantially as follows:

1. The original plaintiff bound himself to deliver to the defendant such Standard Dolph Washers (referring to a species of washing machines known as the "Standard Dolph") as the latter should order, from time to time, at the price of $110 each, which was to be known as the "manufacturer's price" for such Standard Washers.

2. The defendant agreed to pay for such washers the said price of $110 and bound itself to take at least fifty in each year.

3. Dolph was to have the refusal or option of manufacturing any or all machines sold by both parties to the contract, at the price of $110 each, for the Dolph Standard Washer, and, at such price, for other washing machines as might be bid for them, in open competition, for equal quality of goods, by any other responsible manufacturers, and such prices were to be designated as the "manufacturer's price."

No way of ascertaining what the bids of other parties would be was provided.

4. The selling price of the Standard Dolph Washers was fixed at $200 each, about $90 advance on the manufacturer's price, and the selling price of the other washers was to bear the same proportion to the manufacturer's price of the same, viz.: the proportion of $110 to $200. It was provided that the selling price might be changed by the mutual consent of the parties.

5. The parties to the contract agreed to divide equally between them the profit on the sales made by both of them, of any and all washing machines, whether manufactured by the plaintiff or by the defendant. The said profit was to be ascertained, in each case, by deducting the manufacturer's price, as fixed by the contract, from the selling price, as also fixed by the same contract, so that if the defendant bought a Standard Washer of the plaintiff at $110 and sold it at $120, making a profit of $10, it would have to pay the plaintiff $45, making a cash loss on the transaction of $35, besides trouble and business expenses.

6. Each party was to furnish the other, at the

end of each year, a certain statement of the number of washing machines sold.

7. All goods ordered by the defendant, in pursuance of clauses 1 and 2, were to be paid for within four months after delivery.

8. A division of profits was to be made at the close of each year, within the first two months of the year following.

9. A plate, with the name and place of business of the defendant, was to be placed on all machines sold by plaintiff.

10. The contract was to continue five years.

This contract was executed about February 26, 1882; it was dated January 3d of the same year.

In January, 1883, the president of the defendant wrote the plaintiff, saying that the contract was, as he well knew, for three years; that the president and secretary had authority to make a contract for three years only, and asking him to correct the contract and make it for three years. This the plaintiff declined to do, and the defendant then notified him that it would not be further bound by the contract. This notification was March 3, 1883.

On February 28, 1883, or about the same time, the defendant furnished its statement for the year 1882, showing that it had sold sixty-nine washing machines, of which sixty-five were Dolph Standard, while it appears by the evidence of Dolph that he had sold thirty-two during the same year and one Munger machine, making thirty-three. So it seems that the proportion between the two parties the year that they adhered to the contract was just about two to one.

After the contract was repudiated, and the effect of free competition began to be felt, the washers sold by the respective parties were as follows:

1883, Dolph	55.	1883, Laundry Company	121
1884, "	54.	1884, " "	277
1885, "	93.	1885, " "	310
1886, "	125.	1886, " "	385

Fols. 38–41; 67, 68.

During these years the price of these machines fell off rapidly, owing to the competition of outside parties (fols. 68, 69).

The average price obtained by the parties for the No. 2 Standard Washers, which formed the particular production of both parties, was as follows:

1883,	Dolph	$180.	1883,	Laundry Company	$160
1884,	"	135.	1884,	"	119
1885,	"	122.	1885,	"	116
1886,	"	110.	1886,	"	99

Fols. 38–40; 67, 68.

The cost, to Dolph at least, fell with even greater rapidity.

The Dolph Standard Washer cost him, at the time the contract was made, $92.50, and, by the close of the year 1882, $75 (fol. 38). During the year 1883, it fell as low as $60 (fol. 39). In 1884, between $50 and $60 (fol. 39), and 1885, $45 (fol. 40), and in 1886, $46.60 (fol. 41).

In 1882, the cost to the defendant of a machine similar to the Dolph Standard was about $105, or a little less (fol. 65).

There was some evidence given in the case to the effect that Tolhurst, a manufacturer of Troy, had built No. 2 machines for the defendants, at $105, and that on one occasion the Union Brass Company of Chicago had offered to manufacture for them at $110 a machine; but there was no proof that any competing bids were invited from other manufacturers, nor that any such bids were ever made.

When it is stated above that Dolph, the plaintiff, sold a certain number of machines for a certain price, in 1884, 1885 and 1886, it must be understood that the actual sales were made, not by Dolph, but through a certain corporation, to which he had transferred his business (fol. 57). The plaintiff also testified that, during the year 1883, he could have

made the same standard machine that was made by the defendants for $50 (fol. 55).

Upon this evidence the case was sent to the jury under the instructions of the Court, and a verdict for the plaintiff was returned for $7,208 damages, for which judgment was entered, with costs, and the defendant brought error to this Court.

Assignment of Errors.

First.—The Court erred in refusing, at page 24, fol. 47 of the case, the answer of the plaintiff, as his own witness, in which he testified, from hearsay only, that one Tolhurst had bid for the privilege of making No. 2 washers at the price of $105.

Second.—The Court erred in overruling the defendant's objection, on page 24, at fol. 48, to the question:

"Would you have been willing to make these machines at that price, to wit, $105, during the year 1883?"

Third.—The Court erred in refusing to strike out at fol. 59, page 31, the evidence of the plaintiff, Dolph, as to how many machines he had actually sold in 1884, 1885 and 1886, after it appeared that the plaintiff had not sold them at all, but that they were sold by a corporation, to which he had transferred his business, and of which he remained president and general manager.

Fourth.—The Court erred in permitting the plaintiff to testify as to the cost of machines, in the years 1884, 1885 and 1886, when he had no knowledge of their cost, except as informed by the officers of the corporation to which he had sold his business (fol. 60, p. 31).

FIFTH.—The Court also erred in permitting the witness Charles Angus, against the objection of the defendant, to testify as to the number of washers sold by the defendant in the years 1883, 1884, 1885 and 1886, as evidence of the number that would have been sold if the contract had been adhered to by both parties (fol. 61, p. 32).

SIXTH.—The Court erred in refusing to strike out the testimony of the witness Charles Angus, at fol. 64, page 34, as to what the secretary of the defendant had told him as to the cost of the machines.

SEVENTH.—The Court also erred in permitting the witness George W. Gordon to testify against the defendant's objection at fol. 72, p. 38, as to what offers had been made for the manufacture of a No. 2 washer.

EIGHTH.—The Court erred in permitting said witness, Gordon, against the objection of the defendant, to testify to the usual or average percentage of profit customarily realized from the manufacture of articles similar to the No. 2 Standard Washer, and in refusing to strike out such testimony (fol. 75, pp. 39, 40; fol. 77, p. 41).

NINTH.—The Court erred in permitting the plaintiff to testify as to the usual and customary profits of manufacturers making similar machines (fol. 83).

TENTH.—The Court erred in refusing to direct a verdict for nominal damages, upon the several grounds stated by the defendant, on the close of the evidence (fols. 84, 85).

ELEVENTH.—The Court erred in charging the jury that they might consider the profits made by the defendant in the year 1882 as evidence of the profits

that the defendant would have made in subsequent years if the contract had not been broken (fol. 87).

TWELFTH.—The Court erred in submitting to the jury the question of damages, as to any breach of the contract, except the failure to accept the fifty machines each year.

THIRTEENTH.—The Court erred in charging the jury that they might presume that the plaintiffs would have altered the price of the machine by mutual consent, and that they might award damages upon the basis of such suppositious evidence (fol. 94).

FOURTEENTH.—The Court erred in refusing to charge the defendant's first request, to wit, that there was no evidence from which the jury could find what would have been the lowest bid of other manufacturers for making machines similar to the No. 2 Standard Dolph (fol. 95).

FIFTEENTH.—The Court erred in refusing to charge the defendant's second request, to wit, that there was no evidence from which the jury could say whether or not the plaintiff would have accepted such bid if it had been made (fol. 95).

SIXTEEENTH.—The Court erred in refusing to charge the defendant's third request, that there was no proof that the defendant had suffered any damage by reason of the failure of the defendant to order such machines from him (fol. 95).

SEVENTEENTH.—The Court erred in refusing to charge the defendant's seventh request, to wit, that the jury were not justified in finding that the defendant would have sold machines at a loss or with an inadequate profit (fol. 96).

EIGHTEENTH.—The Court erred in refusing to charge the defendant's ninth request, to wit, that the manufacturers' and sellers' price remaining the same as in the contract, the defendant could not have sold machines at a profit after March, 1883 (fol. 97).

NINETEENTH.—The Court erred in refusing to charge the defendant's thirteenth request, to wit, that if the jury were satisfied that, even if the selling price had been changed to meet the falling market, the defendants could then have sold only at loss or with an inadequate profit; the actual sales of the parties since the contract was broken are no evidence of what they would have been if such contract had been adhered to (fol. 97).

TWENTIETH.—The Court also erred in refusing to charge the defendant's fifteenth request, that, if the jury found damages for refusal to take the fifty machines a year, and, at the same time, found that it would have been for the interest of the defendant to quit selling and to yield the market to the plaintiff, and that the sum finally due from the plaintiff to the defendant would be more than the damage for failure to take the fifty machines, they could only find a verdict for nominal damages (fol. 98).

Points for the Plaintiff in Error.

I.

The Court erred in overruling the several objections of the defendant to the admission of evidence, as above stated, and in refusing to strike out erroneous evidence after it had been shown to be incompetent.

1. In order to show the point of several of the objections and exceptions, it will be necessary to examine some of the provisions of the contract.

The contract provided, in the third clause, as follows :

> "That the said A. M. Dolph shall have the refusal or option of manufacturing any and all washing machines sold by the said A. M. Dolph and said Troy Laundry Machine Company, Limited, or for them through their agents, at the price of one hundred and ten dollars ($110) each for the said Standard Dolph Washer, and at such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturer other than said A. M. Dolph, and these prices shall constitute and be designated as the manufacturers' prices for these machines."

It was stated by the plaintiff (fol. 35, page 17 of the Record) that the

> "Dolph Standard Washer consisted of an outer cylinder made of heavy wood, perhaps two inches thick; it is water-tight and has a door in it lengthwise, or lid, which can be opened to get at the cylinder, and the top or outer cylinder is perhaps three feet in diameter and four and a half feet long; that there is an inner cylinder or cage with trunnions or journals on each end; the cylinder is horizontal, and this cage or inner cylinder is composed of staves somewhat like a barrel; it has an oblong door in it, so that the clothing may be put on the inside of the inner cylinder; the shell of this inner cylinder is composed of staves and what we term 'ribs' alternately; the staves have two rows of holes in them, so that water could pass in and out freely, and the ribs are made to project further into the interior of the tub or past the staves toward the interior of the tub, and they give strength to the cylinder that way; there is a proper mechanism attached to the journal of the inner cylinder,

> which protrudes through one end of the outer tub, and there is a gearing put on the outside which rotates the inner cylinder within the outer one, and there is a revolving mechanism, so that after revolving one way for awhile the inside cylinder will reverse and revolve in the opposite direction."

This Standard Dolph machine was not manufactured by the defendant; and, therefore, did not come within the clause which allowed the plaintiff to manufacture at $110; but it was a similar construction of about the same size and costing very nearly the same amount (fol. 41), and, as the defendant did not make any of the plaintiff's machines, that provision in the contract was assumed by both parties to apply, which provided that the manufacturers' price should be fixed by bids in open competition from other manufacturers, and that then the selling price should be to the manufacturers' prices as $200 to $110.

It was necessary, in this view of the case, which was adopted by both parties, to show, in order to fix the selling price, that other manufacturers had bid for the construction of the machines which were made by the defendant, otherwise there could be no definite manufacturers' price, and, if so, no selling price; and, therefore, no basis on which to compute the proper division of the profits; and the plaintiff's counsel assumed the task of proving what the bids of other manufacturers had been.

Mr. Dolph was allowed to state, at fol. 47, against the defendant's objection, what he had heard from another party, as to a bid being made by one Tolhurst, a manufacturer in Troy.

It appeared, on cross-examination, that all he knew about it was that he heard a witness, upon the former trial of this action, say that the company had bid Mr. Tolhurst $105 for building these No. 2 machines. Of course, no question had called this

testimony out, so that the defendant could object to it, but, after ascertaining that it was pure hearsay, he moved to strike it out, and the motion was denied.

There was no proof in the case that Mr. Angus had anything to do with the company, or that he had any knowledge upon the subject; and I cannot conceive upon what possible theory the testimony could be competent or admissible.

2. The next question, at fol. 48, was:

> "Would you have been willing to make these machines at that price during the year 1883?"

This was objected to as incompetent and immaterial, and the objection was overruled.

The reason why it was incompetent and immaterial was that there was nothing in the nature of a "bid" about the transaction. The contract provided that the manufacturers' price should be set by the price "bid for them in *open competition* for equal quality of goods by any responsible manufacturers other than said Dolph." What was sought to be shown, and what was shown, was that the defendant hired Tolhurst to make these machines at a particular price. There was nothing in the nature of a bid, or in the nature of open competition about the transaction. And it clearly was not, in any sense, a compliance with the contract. It is perfectly true that the contract did not point out any way to ascertain these bids; but, if the plaintiff entered into a contract that could not be enforced, that was no fault of the defendant.

3. The witness made a long statement (fols. 38–40) in which he stated positively how many machines he had sold, how much they had cost, and what he had obtained for them, during the years 1884, 1885 and 1886. There was nothing whatever to show, during the giving of this testimony, that

he was not talking about his own individual business; but he also testified as to the pains which he had taken during the six years to sell machines; but, on cross-examination, it appeared, at fol. 54, page 26, that he sold his business to a corporation, in January, 1884, and that they have carried on the business since at the same place which he formerly occupied. He said, at fol. 52, that since January, 1884, he had not manufactured at all for himself; and it appeared, at fol. 59, that when he said that he sold a certain number of machines, in 1884, 1885 and 1886, he did not mean that he sold them, but that A. M. Dolph & Co., a corporation, sold them. After ascertaining this fact the defendant's counsel moved to strike out the testimony as to the sale of the machines, upon the ground that what another party sold, or another corporation, but not the plaintiff at all, was no proof of what the plaintiff would have sold if the contract had been adhered to.

Upon the suggestion of the plaintiff's counsel that he was president and general manager of the corporation, the Court refused to strike out this testimony. I am at a loss to see upon what possible grounds it could be maintained. The corporation was another individual from Mr. Dolph, with property of its own, and controlled, not by him, but by a board of directors. The fact that he was general manager did not give him the entire control of the corporation. He was still bound to conduct it under the authority of the board of directors, and it seems too clear to need argument that the sales made by that corporation were no criterion as to the sales which Dolph would have made, individually, if he had continued the business. Therefore, if his sales after the contract was broken were any evidence at all (which I deny) of what they would have been had the contract not been broken, certainly the sales of the cor-

poration to which he had transferred his business throw no light whatever upon that subject.

4. In order to instruct the jury upon the question of damages, during the years 1884, 1885 and 1886, the plaintiff was asked the cost of machines, made by the A. M. Dolph Company, the corporation to which he had sold out.

If the Court will look at the record, at fol. 60, it will see that the whole evidence of the plaintiff, upon that subject for those years, was pure hearsay. When, in the first instance, he had stated the cost of these machines, there was nothing to notify the counsel for the defendant that he was not speaking from personal knowledge, but after it was learned that he sold out to a corporation, in 1884, the counsel for the defendant ascertained that all he knew of the statement which had been put in evidence was information derived from the secretary. The defendant then moved to strike out the testimony on the ground that it was hearsay, and that the plaintiff had no personal knowledge as to the facts to which he had testified, which motion the Court at once denied. It is impossible to strengthen the conclusion that this ruling was erroneous by anything in the nature of argument. If hearsay testimony is ever inadmissible, this testimony is inadmissible.

5. At fol. 61, page 32, the witness Charles Angus was asked this question:

"Mr. Angus, I will ask you to state to the jury the number of No. 2 washers that were sold by the defendant company in the year 1883?"

This was objected to upon the ground stated in the record, to which the attention of the Court is directed.

The point of the objection was this: In 1882, im-

mediately after the contract was formed, the defendants accepted the manufacturers' price of $110 and the sellers' price of $200, and sold a large number of machines, and sold so many more than the plaintiff, that the balance due from the defendant to the plaintiff at the end of the year was $2,701. The object for which this testimony was offered was to permit the jury to infer from the number of machines that were sold after the contract was broken, and the defendant and plaintiff were in brisk competition with each other, the number of machines that would have been sold by the defendant had the contract been strictly adhered to. Now it is in proof that the defendant, during the whole period from 1883 to 1886, put his machines upon the market at a lower price than the prices for which the plaintiff sold similiar machines, and that is, undoubtedly, the reason why the sales of the defendants increased so largely over the plaintiff's sales.

Now, the precise question before the Court is this: The agreement of these parties was that the manufacturers' price for the No. 2 machines, for instance, was to be fixed by bids from outside manufacturers. There was no provision for fixing the manufacturers' price but once, and the Court held that that price was fixed at $105, because that was Tolhurst's bid. It must have been either $105 or $110, for those sums were the only prices at which anybody offered to make the defendant's No. 2 machine. Assuming the manufacturers' price of the contract to be $105, then, for every machine that the defendant sold it would have to pay the plaintiff one-half the difference between $105 and $200, or $95. But, in 1883, the market price fell to $160. The manufacturers' price remaining the same, the entire profit on the machine would be $55, and of this, $47.50 must have been paid to the plaintiff for his share of the profit under the contract.

If the defendant paid the share of the profits to

the plaintiff it would make $55 gross profits upon each machine. If it did pay the contract profit to the plaintiff it would make $2.50 upon each machine, from which must be paid the expenses of business, and disposing of the machines by agents.

I think it was erroneous and unreasonable to submit the question to the jury whether the defendant would have sold as many machines, at a heavy loss, as it did sell when it was making a handsome profit; and these considerations apply with still greater force to the years 1884, 1885 and 1886, when the market price of the machines was less, and the slight profit changed into a loss. There was no moment, during the whole four years, at which the defendant could have adhered to the contract, and sold its machines at anything but a heavy loss; and yet those sales, actually made at a profit, were sent to the jury as evidence of what the defendant would have done if it had adhered to its contract.

6. At fol. 64, page 34 of the record, the plaintiff's witness, Mr. Charles Angus, was asked how the cost of manufacturing by the defendant compared with the price paid to Mr. Tolhurst. He replied that he did not know the figures, but that Mr. Conkling figured up the cost of the washers and told him that they were making them for less than Mr. Tolhurst. The question did not call for what Mr. Conkling said and there was no opportunity to object to it, but the defendant moved to strike out the evidence on the ground that it was hearsay, and the motion was refused and an exception taken. The testimony was apparently admitted, upon the ground that anything that is said by the officer or the agent of a corporation is evidence against the corporation under all possible circumstances. That is an expansion of the rule to which no Court has ever given its sanction.

In the case of White *v.* Miller (71 N. Y., 135),

the Court of Appeals examined this question, and held that

> "In cases of agency, the declarations of the agent are not competent to charge the principal upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to and were connected with the business then depending, so that they constituted a part of the *res gestæ*."

That is to say, the declarations must relate to some business transaction between the principal and a third party, and must be of such a character that they, in some way, modify or explain the transaction. This was simply a conversation between two officers of the defendant company, and had no relation to any business transaction whatever.

The Court of Appeals quotes, with approbation, an extract from the opinion of the Court in Farlie *v.* Hastings (10 Ves., 127), to which I direct the attention of the Court.

The declaration that was here called for did not constitute any agreement, which Conkling was authorized to make, nor did that relate to any act done in the course of his agency for the corporation; it was clearly inadmissible.

7. At fol. 72, page 38, the witness George W. Gordon was put upon the stand, and testified that from 1882 until January, 1885, he was the manager of the Troy Laundry Machinery Company. He was then asked what bid was made to the defendant company by other manufacturers for the manufacture of a No. 2 washer. This was objected to upon the ground that it was immaterial, unless it was shown that bids were invited by the defendants

from different manufacturers, to bid in open competition with each other, and the objection was overruled and an exception taken.

The contract expressly provided that the selling price which the defendant was to pay to the plaintiff for machines other than the Dolph Standard, was to be fixed by bids of other manufacturers in *open competition*. The words "open competition" implied that each manufacturer bidding should be either aware of the bids of the others or aware that he was bidding in competition with other manufacturers, that competing bids were invited, and that if he wished to get the business he must make his bid as low as he could do so and make a reasonable profit. The only proof on that subject was that Tolhurst, in Troy, had built for $105, and that the Union Brass Company, in Chicago, had offered to build for $110. There is not a scrap of proof to show that Tolhurst knew anything about the bid of the Brass Company, or that the Brass Company knew anything about the bid of Tolhurst, or that either were aware that they were competing with others for the fixing of the price; and this testimony was objectionable and inadmissible for that reason.

8. This same witness, Mr. Gordon, was asked, at fol. 74, p. 39, what is the usual or average percentage of profit customarily realized by manufacturers of articles similar to the No. 2 Standard washers.

The witness was four years in a laundry and manufactory carried on by J. M. Munger & Co., who, it seems from the statement at fol. 73, manufactured their own washing machines; but there is no proof that they sold to others. He was also with the Troy Laundry Machinery Company from 1882 to 1885, something like three years. The Troy Laundry Machinery Company did not begin to manufacture until 1883, and only one or two machines in that

year, so that he was simply the Chicago manager of the Troy Laundry Machinery Company during only one year while they were manufacturing, which was 1884. The Troy Laundry Machinery Company did not sell to dealers at wholesale, but sold only to users. Upon this experience, he was asked what the average manufacturing profits of makers of machines of this class were. It was objected to, upon the ground that he had no acquaintance with the subject sufficient to enable him to speak. The Court said that he had, and permitted him to testify ; I submit that that was error. Even supposing the testimony was material, which, in my judgment, it was not, he had no opportunity of learning of any usual or average profit among such manufacturers.

The plaintiff, Mr. Dolph, was asked the same questions, from fol. 79, page 42, to fol. 84, page 45, and swore that the average manufacturers' profit was about 60 per cent. to 65 per cent. on first cost.

It was attempting to show in this way, I suppose in the absence of any proof of definite bids from competing manufacturers, what the plaintiff's profits would have been had he manufactured these machines for the defendant. In the first place, all this evidence was entirely immaterial. The contract provided for fixing the sum which the defendant should pay to the plaintiff for the washing machines manufactured by him. That was the only criterion of profit; and there was no provision for fixing the price but once. To leave to the jury to see what the rate of profit would have been, if the defendant had manufactured these machines for the plaintiff, without any price being fixed, as provided by the contract, was plain error. It was giving them an entirely wrong basis upon which to estimate damages. But, in the second place, Mr. Dolph had no kind of knowledge upon the subject to enable him to speak, if the average rate of profit had anything to do with

it. The contract was between a manufacturer, not selling to the users of the machines, and another company which was to deal in the machines and resell them to the users, and, if there was any question of manufacturers' profit, it should be applied to just such a case.

Now, on cross-examination, he testified, explicitely, that he neither sold to dealers himself, nor had any knowledge of the business of any manufacturer who did sell to dealers; that any manufacturer, of whose business he had any knowledge whatever, sold to the users, as he did, and as the defendant did. Therefore, he had no knowledge which would enable him to state any average profit of manufacturers selling machines to dealers for resale; and, as a matter of fact, I suppose there were no such manufacturers in the country.

II.

The Court erred in its charge to the jury upon the various points to which the defendant excepted.

1. The Court erred in submitting to the jury the question of damages, as to any breach of the contract, except the failure to accept the fifty machines each year. Had the evidence been confined to that matter there would have been some basis for damages as to those fifty machines. As to those the defendant was to pay for them $110 each, and the plaintiff could recover the difference between that $110 and any lower price which would be the market value of the machines, or for which he could sell them. But as to the remainder of the contract, it was all vague and loose speculation, without any proof, and without any possibility of proof.

The jury were required to estimate, not the profits of a particular transaction, or the probable profits of a particular business event, but what would have been the comparative profits of two separate manufacturers, under circumstances essentially different from the actual circumstances, under which the actual business was done. In the first place, there was no evidence that any manufacturers' price was fixed by bids in open competition. In the next place there was no evidence that if such price had been fixed the plaintiff would have manufactured machines at that price. In the third place there was, and could be, no competent proof of how many machines the parties would have sold.

The first year of the contract, 1882, the defendant sold sixty-five machines, and the plaintiff, thirty-three. It was a matter of indifference whether he sold the machines or whether the defendant sold them. The price that year was $200. At that price there was a strong inducement for the defendants to sell all they could ; for, though, if they sold more than the plaintiff, they would have to pay $45 on each machine of the excess, still they would retain $45, or a profit of some 40 per cent.

But the case was widely different, when, in 1883, the price fell to $150, which was the average of the defendant's sales for that year.

Let us see how the two parties would stand in the year 1883, with the selling price of the contract at $200, as the plaintiff had a right to keep it, and as it was at the time of the breach.

The defendant said that its machines cost it to manufacture $105, while the plaintiff swore that he could make them for $50 each. The Judge held that the price bid by other outside manufacturers would have been, if they had been allowed to bid, $105 ; though, why outsiders should have necessarily bid $105, when they only cost the plaintiff $50, is not quite clear. But, I will admit, for the sake of the ar-

gument, that the contract price for which the plaintiff would have manufactured these machines for the defendant was $105 each, and that if the contract had been adhered to, the defendant would have had to pay the plaintiff $105 for every machine it sold. By the contract, the selling price of these machines would be ascertained by a sum in proportion, as $110 is to $200, so is $105 to the answer, which would be $191. The profit to be divided would be $191—$105=$86, one-half of which would belong to the plaintiff. The defendant would thus pay the plaintiff for each machine $105+$43=$148, and his profit on each sale would be the handsome sum of $2. In other words he could not make a sale, except at a heavy loss. As to the plaintiff, he swears that he could make the machines for $50 each. If he was compelled to sell at $150, he would receive a gross profit of $100. After paying the $43 to the defendant, he would have a clear profit of $57, considerably over 100 per cent. The jury were substantially instructed that, under the circumstances I have just set forth, they might find that the probability was that the parties would have sold, respectively, in the exact proportions in which they did sell when each was getting all he could and keeping all he got. In other words, it was probable that the plaintiff would have sold only fifty-one machines at 100 per cent. profit, while the defendant would have sold one hundred and twenty-nine machines, losing money on every one of them.

Now, I should figure the probability for the year 1883, as follows: As the defendant could only sell at a loss, it was obliged to take from the plaintiff and no more. It would pay $110. The cost to plaintiff would be $60, a profit according to the rule laid down at the trial of $50 per machine, or $2,500. In addition, the plaintiff would be entitled to $45 per machine as his share of defendant's profits, or $2,250, making in the whole $4,750. But, as the plaintiff could only sell at a loss, it would sell the fifty ma-

chines and no more, and turn its attention to something else.

Both parties together sold one hundred and eighty machines that year. As there was a demand for that number, and the defendant could only sell fifty, it was reasonable to presume that the plaintiff would, if freed from competition, sell the other one hundred and thirty, on each of which he would pay the defendant $45, or $5,850, so that at the end of the year, instead of anything being due him, he would owe the defendant $1,100.

In 1884, the average price obtained by defendant was $125 on every machine sold by the defendant. According to the contract, it would have to pay $148 or $23 more than it could obtain for the article sold. The cost of the plaintiff's machine had declined to $45, and, as he says, he could have made the defendant's machine for $10 less. It would be reasonable to call the cost to him of the defendant's machine $40. He would then at $125 make a gross profit on each sale of $85, and, after paying the defendant his $43, would have a net profit of over 100 per cent.

I think it would have been erroneous to instruct the jury that there was a probability, that, in the year 1884, the defendant would sell two hundred and eighty-five machines at a dead loss of $23 on each, and that the plaintiff would probably sell only forty-four machines at a profit of 100 per cent.

The same probability that applies to the year 1883, as stated above, would apply to the year 1884; so, too, in the year 1885, when the prices were falling, say to $115 for every machine sold by the defendant, he would have been obliged to pay the plaintiff $148, or $33 more than he could obtain for it, while the plaintiff would make a gross profit of $115—$40 =$75, and, after paying $43 to the defendant, would still have a profit of $32, or some eighty per cent. on each machine.

The same probability, as to which party would

have sold the machines, applies to the year 1885; and these considerations apply with full force to the year 1886.

It is perfectly clear, then, that it was not only probable, but an absolute certainty, that, instead of selling the same number of machines, if the parties had adhered to the contract that they did sell after it was broken, that, in no year after 1882, would they have sold more than fifty machines.

2. The Court erred also in charging the jury that they might presume that the parties would have altered the selling price of the machines, by mutual consent, and that the jury might award damages upon the basis of such supposititious agreement.

The Court did not charge the jury that the defendants would have sold machines at a loss. On the contrary, they were told, substantially, at fol. 94, that, had the contract remained in force, the competition would have been such that the parties would have lost the chance to sell any machines at all, had they adhered to the stipulated price of $200, or, what is the same thing, $191, which is true; but the Court omitted to perceive that at the actual prices the plaintiff could have sold machines at a profit, while the defendant could not. The contract did not compel the parties to sell machines at $200 or $191. It only provided that whatever they received for the machines, they should divide the profits upon that basis. But the Court charged the jury that, inasmuch as there was a clause in the contract which permitted the selling price to be altered, they might presume that they would, by mutual consent, alter the selling price and reduce it so low that the defendant could afford to sell machines.

Now, of course, the fact that it was provided that

a particular clause in the contract might be changed, by mutual consent, did not, in the least, alter the legal effect of the contract. Any contract can be changed by mutual consent. It is not necessary to insert a provision to that effect. But the jury were told that they need not award damages upon the contract, as it was made and as it remained when the breach occurred. They were told that they might guess that the plaintiff and the defendant would consent to lower the selling price, and that they might award damages upon the basis of such change in the contract.

I have not searched for precedents against this ruling, for I strongly doubt that any such rule was ever before laid down, in a Court of Justice.

I respectfully urge, as I did, at the trial, that the defendants are sued for a breach of the contract that they made, that it is impossible there should be such a thing as a breach of a contract that never was made, and that the instruction to the jury to modify the contract and give, as damages, the probable profits on the modified contract, was utterly erroneous.

It is generally a sufficient penalty to compel a party to pay damages upon a contract that he has made ; but to compel him to pay damages for the breach of a contract which the jury think he might, could or should have made, is certainly erroneous. What possible guide could the jury have as to what change the defendants would have made in this contract ? The plaintiff had a contract, which would compel the defendant to pay him $43, upon every machine that it sold. What reason had the jury to suppose that the plaintiff would abandon that contract, in order to give his rival an opportunity to sell more machines ? Might he not prefer to sell the machines himself and drive the defendant out of the market ? And what justified the jury in saying that he would not exercise that preference ? What

right had the jury to suppose that the defendant, when he saw that competition was rapidly lowering the price which could be obtained for the machines, would consent to a new agreement, which would give the plaintiff an extra profit of $7,200 in four years? Perhaps, the defendant would have preferred to have gone out of the business of making washing machines, and manufactured something else.

This consideration seems much stronger, when we remember the fact that there was no provision in the contract for establishing a manufacturer's price, but once; that that price was established at $105, and that, by 1884, at least, the defendants could not even have paid the selling price of $105, and made a reasonable profit on the machine; and in 1885 and 1886 they would have sold at a loss. To be sure, the Judge told the jury, upon request of the defendant, that the parties had just as much right to alter the manufacturers' price as the selling price, and it is interesting to consider what the ideas of the jury could have been upon this charge. They were told not to estimate the damage upon the contract as it stood when the breach occurred. They were told, practically, to make an entirely new contract for the parties, such as they supposed that the parties might make, in accordance with their mutual interests, then to suppose that the defendants, after agreeing to a new contract, with which they were satisfied, would be guilty of a breach of it, and then to award damages upon the basis of that entirely imaginary contract.

It is impossible that the judgment obtained under such a construction as that can be sustained in this court.

Several requests were made by the defendants, which, in my judgment, were entirely proper and should have been charged. The facts upon

which the requests were based are substantially discussed in the foregoing points, and, while I do not waive the exceptions taken, I do not deem it necessary to review them here.

I submit that I have pointed out enough errors to reverse the judgment, and that it should be reversed, and a new trial ordered.

ESEK COWEN,
Of Counsel for Plaintiff in Error.

which the requests were based are substantially discussed in the foregoing points, and, while I do not waive the exceptions taken, I do not deem it necessary to review them here.

I submit that I have pointed out enough errors to reverse the judgment, and that it should be reversed, and a new trial ordered.

ESEK COWEN,
Of Counsel for Plaintiff in Error.

FILED.
JAN 7 1891

Supreme Court of the United States.

THE TROY LAUNDRY MACHINERY CO., LIMITED, } *Plaintiff in Error,*

vs.

ALEXANDER M. DOLPH, } *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

H. P. LLOYD,

COUNSEL FOR DEFENDANT IN ERROR.

ZINSLE & CO., CIN., O.

Propositions Discussed in this Brief.

1. A contract between a manufacturer of laundry machinery and a dealer, who is not a manufacturer, by which one should manufacture and sell to the other at a fixed price, and both agree to maintain a fixed selling price, for a period of five years, with a provision in the contract, however, that the selling price might be changed from time to time, and that the mutual profits of the manufacturer and the dealer should be equally divided at the end of each year, is not in restraint of trade, when it appears in evidence that there were many other manufacturers of laundry machinery in the country, openly competing in market with the same kind of goods for the patronage of the public. Such a contract is valid and is enforceable in law.

2. Under the contract set forth in the original complaint in this action, it is proper for the plaintiff to show, by competent testimony, the usual average percentage of profit customarily realized by manufacturers of analogous articles.

3. All the facts and circumstances of the case, bearing directly upon the points in issue, may be properly shown by competent evidence.

4. Under the contract in question, the plaintiff, in his recovery, is not limited to the damages resulting from the defendant's failure to take the minimum number of machines in each year, as specified in the second clause of the contract, but may recover all actual damages, when proven by competent evidence submitted to the jury under proper instructions from the court.

Supreme Court of the United States.

THE TROY LAUNDRY MACHINERY CO., LIMITED, *Plaintiff in Error,*

vs.

ALEXANDER M. DOLPH, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case comes into this Court on a Writ of Error to the Circuit Court of the United States for the Northern District of New York.

Alexander M. Dolph was the plaintiff below, and filed his complaint against the Troy Laundry Machinery Co., Limited, in February, 1884, the action being founded upon a written contract which is set forth in the complaint, and is found on page 1 of the record. The defendant below appeared and answered, setting forth several grounds of defense, the most of which were abandoned at the trial. The case was tried to a jury in the Circuit Court, and a verdict was rendered in favor of Dolph for the sum of $16,000 (see page 9 of the record). The defendant

Supreme Court of the United States.

THE TROY LAUNDRY MACHINERY CO., LIMITED, } *Plaintiff in Error,*

vs.

ALEXANDER M. DOLPH, } *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case comes into this Court on a Writ of Error to the Circuit Court of the United States for the Northern District of New York.

Alexander M. Dolph was the plaintiff below, and filed his complaint against the Troy Laundry Machinery Co., Limited, in February, 1884, the action being founded upon a written contract which is set forth in the complaint, and is found on page 1 of the record. The defendant below appeared and answered, setting forth several grounds of defense, the most of which were abandoned at the trial. The case was tried to a jury in the Circuit Court, and a verdict was rendered in favor of Dolph for the sum of $16,000 (see page 9 of the record). The defendant

below moved for a new trial on the ground of excessive damages. The case was argued before the Circuit Judge, who was not present at the jury trial, and he rendered a written opinion granting a new trial (see pp. 55 to 59 of the record). The case was again tried to a jury, and a verdict was rendered in favor of Dolph, as plaintiff below, in the sum of $7,208.00; a Bill of Exceptions was prepared and allowed, and the case was brought on error to this Court.

The testimony shows that, at the time of the execution of the contract, to-wit:—January 3d, 1882, A. M. Dolph was a manufacturer of laundry machinery in the city of Cincinnati and State of Ohio, that he had a large new factory equipped for the purpose of such manufacture, and that the Troy Laundry Machinery Company was a dealer in laundry machinery, but without a factory, having its machines made to order by other persons, or buying such machinery ready made in the market and re-selling. This Company was a dealer in machinery, and not a manufacturer, at the date of the execution of the contract. There were several other manufacturers of laundry machinery in the United States, at the time, viz: The Empire Laundry Machinery Co., of Troy, New York; J. M. Munger & Co., of Chicago; The Union Brass Manufacturing Co., of Chicago; J. B. Ellicott, of Chicago; Oakley & Keiting, of New York City; and the American Laundry Machinery Co., of New York City. A short time after the execution of the contract other factories commenced operations, viz: The A. P. Adams Company, of Troy, N. Y., and Layman & Mahoney, of Troy, N. Y. (See pp. 36, 37 and 38 of the record.)

For some months prior to the execution of the contract in question, a firm, called Adams, Kelley and Angus, had been in the laundry machinery business, as dealers, in the city of Troy, New York, and negotiations had been in progress between the members of this firm and A. M. Dolph, for the purpose of effecting a contract for the manufacture and sale of laundry machinery. At the time of the actual execution of the contract, however, this firm was dissolved, Mr. Kelley retiring, and a corporation known as a "Limited Company" was organized under the laws of New York, called "The Troy Laundry Machinery Company, Limited," and this corporation completed the negotiations and entered into the contract with Alexander M. Dolph.

Both parties immediately entered upon the performance of the contract; the Troy Company selling machines ordered from Dolph, Dolph manufacturing for the Troy Company and for himself, and selling machines in the territory which he could reach most easily. The contract appears to have been mutually advantageous and satisfactory to both parties during the first year, but when the time came for the annual settlement, as provided in the contract, it appeared that the sales by the Troy Company had been larger than the sales made by Dolph; and hence, there was a balance to be paid by the Troy Co. to Dolph. This seemed to cause dissatisfaction to the Troy Co., and led to the breach of the contract by the Troy Co. and its formal refusal to be longer governed by the provisions of the contract. Some correspondence passed between the parties, and the letters of the Troy Co. to Dolph are found on pages 21 and 22 of the record.

The statement of the number of machines sold during the year 1882, by the Troy Company, is found on page 15 of the record, and in the supplement, and the statement of the machines sold by A. M. Dolph, during the same period, is found upon page 18 of the record. The number of machines, properly included in the contract, and which were sold by A. M. Dolph during the four remaining years of the contract, is shown in his testimony on pages 19 and 20 of the record.

The officers of the defendant were served with subpœnas *duces tecum*, to bring the books of the defendant, to show the number of machines included in the contract which were sold by the Troy Co. during the same period of four years, from 1883 to 1886, inclusive. Mr. Angus, who was the Secretary of the Troy Co., was called to the stand and presented tabulated statements for those years, which appear in his testimony on pages 31 and 32 of the record. This testimony, in connection with the contract, affords the basis for a computation of the damages recoverable by Dolph against the Troy Co., and the charge of the Court gave to the jury the law applicable to the peculiar features of the contract and of the testimony.

At this point we call attention to the fact that the case was twice tried to a jury, as appears by the record. The first trial was in 1886, before the District Judge, holding Circuit Court at Utica, N. Y. The verdict of the jury awarded to Dolph damages against the Troy Co., in the sum of $16,000.00. A motion for a new trial was made on the ground of excessive damages. This motion was heard before the Circuit Judge sitting with the District Judge, and Judge Wallace, speaking

for the Court, delivered the opinion found on pages 55 to 59 of the record granting a new trial. On page 59 of the record, the Circuit Judge stated the rule:

"The damages applicable to that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other washing machines at the lowest price bid by other manufacturers, &c."

Under the instruction of the Court thus given, two witnesses were called to testify at the second trial in regard to the "usual or average percentage of profit customarily realized by manufacturers of analogous articles or some established manufacturer's price." Upon the whole testimony and the charge of the Court, which charge is found in full on pages 46 to 51 of the record, the jury retired and found a verdict for Dolph against the Troy Co. in the sum of $7,208.00; motion for a new trial was overruled; and the case comes into this Court on a Writ of Error to the Circuit Court.

ARGUMENT.

FIRST.

Was the Contract Valid?

It will aid the Court in the consideration of this case to have the provisions of the written contract between the parties briefly stated in order.

1. A. M. Dolph, at his factory in Cincinnati, was to build, furnish and deliver at railway station, within a reasonable time after receipt of order, certain machines known as "Dolph's

Standard Washers," at the price of $110.00 each, which amount was designated as "the manufacturer's price."

2. The Troy Laundry Machinery Company agreed to pay to Dolph $110.00 each for said washers, and agreed to take and pay for at least fifty such machines in each year during the five years' term of the contract.

3. Dolph had the option of manufacturing all washing machines sold by both parties, or sold for them through their agents, at the fixed price of $110.00 for the "Standard Dolph Washers," and at such price for other machines as might be bid for them in open competition for equal quality of goods by any other responsible manufacturer; and this price, thus established, should be designated as "the manufacturer's price" for these machines.

4. The selling price, in the first instance, was fixed at $200.00 for the Dolph Standard Washer, and the selling price for other machines was fixed at an amount the same in proportion to the designated manufacturer's price thereof as the selling price of the Dolph Washer bore to the manufacturer's price thereof; provided, however, that such prices might be changed from time to time by mutual consent.

5. A. M. Dolph and the Troy Co. agreed to divide equally the entire profits arising from the combined sales made by the parties themselves or for them by agents, and this profit was to be the entire margin between the manufacturer's price and the selling price, as fixed at the time the sale was made; provided, however, that a discount of twenty per cent. might be allowed, by either party, to their regular and published agents,

other than a paid employe, on sales made by such agent, which discount might be deducted from the profits before the division thereof was made.

6. Each party must furnish to the other annually, a sworn statement of the number of each kind of washing machines sold, also the profits made above the manufacturer's price on sales of washing machines other than Dolph's Standard Washers. Also, the number of machines sold by agents.

7. The Troy Co. agreed to pay Dolph for its purchases within four months from delivery of goods.

8. At the close of each year a division of profits should be made, as above stated, and the money due from one to the other paid within the first two months,

9. Provided for the name plates.

10. The agreement was to continue for five years from January 3d, 1882.

Under these provisions, it was claimed by the defendant, on the trial below, that the contract was not enforceable, because it was contrary to public policy and in restraint of trade. Let us briefly examine this defense.

1. This contract was not made between two manufacturers to control the production of a class of goods; it was not a contract between two jobbers seeking to control the market for a particular line of merchandise. The object was not to create a monopoly, by which the general public should be forced to buy of the parties to the contract or to pay for their purchases an exorbitant price.

The testimony shows that at the date of the contract, the Troy Co., was not a manufacturer, but simply a dealer; A. M.

Dolph was a manufacturer wishing to increase the demand for his output. The contract, then, was between a manufacturer on the one side, and a dealer on the other, by which they were to work in harmony for their mutual advantage, and the contract simply prescribed the terms upon which the business was to be conducted by these two parties.

The testimony further shows, that at the date of the execution of the contract, there were a large number of other manufacturers in the field competing for the patronage of the public; companies and firms with large capital, with enterprise and industry, offering their goods throughout the United States, and that the public were as free to buy from any of these other manufacturers as from the parties hereto; hence, if the Dolph Washers were sold, they must be sold upon their merits, and because the public was satisfied with their quality, and not because purchasers were in any wise restricted as to the source of supply.

2. Even if this state of facts had not existed, there is nothing in the provisions of this contract which is contrary to public policy or in restraint of trade. There is nothing in the testimony to show, that under this contract, prices of any machines were advanced above those hitherto prevailing; on the contrary, the prices of machines steadily declined. There was no attempt to combine against other existing manufacturers or to prevent new ones from entering the field.

In determining whether a contract in restraint of trade is legal, the nature of the business, and the supply furnished to the public by other dealers are to be considered. Whether

or not a contract is void, as being in restraint of trade and against public policy, is a question of law for the Court to determine. The courts of the country have frequently spoken in regard to similar contracts, and we offer a few of the decisions to substantiate our position.

"A contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society."

Peterson v. *Christensen*, 26 Minn. 377.
Story on Contracts, Sec. 546.

"Although public policy requires that any man shall be at liberty to work for himself, and shall not deprive himself or the state of his labor, skill or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labor, skill or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable having regard to the subject matter of the contract."

Leather Cloth Co. v. *Lorsont*, Law Reports, 9 Equity, 345.

"Where the restraint was not general, but applied to a particular person and within prescribed and reasonable limits, the contract would be enforced.

"Whether the prescribed limits are reasonable or not, depends upon the kind of business about which the contract is made."

Duffy v. *Shockey*, 11 Indiana, 72.

"The owner of a medicinal preparation involving a secret formula agreed, on making a sale of the right to prepare and vend the same, not to sell the preparation west of the Rocky Mountains. Held, a valid contract, against the violation of which the purchaser could claim the protection of the courts."

Fowle v. *Park*, 131 U. S. 88.

The utmost that could be claimed by counsel for Troy Co. would be, that the agreement operated as a partial restraint of

trade. Leading text-writers on the subject of contracts have expressed themselves as follows:

"It is not an unlawful restraint of trade for several persons carrying on the same business, in the same place, to agree to divide among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid, because they may operate in partial restraint of the parties' freedom to exercise their trade."

Pollock on Cont., p. 311, citing—
Hatcher v. *Andrews*, 5 Bush, 561.
Guerand v. *Dandalet*, 32 Md. 561.
Graselle v. *Larder*, 11 Ohio St. 349.
Kellogg v. *Larkin*, 3 Chandler (Wis.) 133.

"Contracts in restraint of trade, however, if they are partial, reasonable, and founded on a valuable consideration, and not for any special reason unjust or inequitable, will be enforced in equity."

Bispham's Prin. Eq. Sec. 228, citing—
Morris v. *Colman*, 18 Ves. 437.
Morse v. *Morse*, 103 Mass. 73.
Allsop v. *Wheatcroft*, L. R. 15 Eq. 59.

We also ask the careful attention of the Court to the opinion of the Circuit Judge, who had all the testimony before him, and who heard, at length, the arguments of the counsel for the defendant below upon this subject. This part of the opinion is found upon pages 56 and 57 of the record.

This Court gave careful consideration to the subject, in the case of *Oregon Steam Navigation Co.* v. *Windsor*, 20 Wallace, p. 64, and Mr. Justice Bradley, speaking for the Court, said:

"There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his

occupation, and thus being prevented from supporting himself and his family. It is evident that both of these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

It is perfectly evident, from the testimony in the case, that neither of the objections stated by this Court in the case last cited exist in the case at bar, and the conclusion which the Court reached in that case is certainly applicable to this:

"If the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

SECOND.

Alleged Errors.

In the assignment of errors filed by Plaintiff in Error are several objections to the admission and exclusion of testimony at the trial in the Court below. We notice these in their order:

1. There was no error as alleged in the first assignment, as the plaintiff simply repeated a statement made by defendant's own secretary given under oath at a previous trial of the case. Such evidence is not hearsay; it is an admission against interest made by the adverse party, under oath. It is unnecessary to cite authorities.

2. There was no error as alleged in the second assignment, inasmuch as the plaintiff simply said that he would have been willing to make the machine at the same price named by another manufacturer. This was in strict accordance with article third of the written contract, and Dolph had a right to show that he was willing and able to fulfill this provision. (See page 13 of the record.)

3. There was no error as alleged in the third assignment, as Dolph's manufacturing business was simply put in the form of a corporation for convenience, and he still remained in full charge as President and General Manager. (See page 29 of the record.) The testimony had no greater and no less weight, than if the business had remained in the name of A. M. Dolph. There had been no change in the line of goods or in the character of manufacture.

4. The same answer applies to the fourth assignment of errors. Dolph was the manager of a large business, and necessarily had to employ subordinates to attend to details. The testimony was entirely competent.

5. There was no error as alleged in the fifth assignment Charles Angus was the Secretary of the defendant Company. Its books and papers were in his custody. The statements presented by him were compiled from the books in his possession. These statements were not offered as conclusive evidence of the number of machines which the Troy Co. would have sold if it had not repudiated the contract. They furnished one element, and a very proper one, for the jury to consider, under the instructions of the Court, as to gains prevented and losses sustained.

These statements were legitimate evidence, and if the jury had strictly applied the proper rule of law to the testimony, the verdict in Dolph's favor might have been five times as great. That the verdict is so small shows that this part of plaintiff's testimony was not controlling, and was only one of the many circumstances in Dolph's favor.

6. There is an erroneous designation of parties in the sixth assignment. Conkling was not the Secretary of the Troy Co. Charles Angus was the only Secretary of that Company from its organization January 1st, 1882, to April 1886, and Angus was himself Secretary when he testified at the first trial of this action. Conkling was the Treasurer and kept the books of account. (See pages 31 and 34 of the record.) Both were officers of the corporation, and the corporation had no other mouthpiece than its officers. This was a communication of the Troy Co., with itself, and Angus could not so reliably inform himself in any other way as by the statement of the treasurer. The statement is not prejudicial to the plaintiff in error in any view of the case.

"Even if the testimony was erroneously admitted, the defendant suffered no prejudice from its admission."

Hinckley vs. Pittsburgh Steel Co., 121 U. S. p. 278.

7. In the seventh assignment, complaint is made that the witness, Gordon, was allowed to testify as to offers made to defendant for the manufacture of washing machines. It must be borne in mind that Gordon had been, from the organization of the company, January 1st, 1882, until January 15th, 1885, the Chicago Manager of the Troy Laundry Machine Company, and that he was *a confidential* manager (see pages 38 and 39 of the record).

The Plaintiff, Dolph, had a right to show that under article third of the contract, the Troy Co. had received bids from other manufacturers. He had the further right to show what those bids were.

Gordon was the confidential manager of the Troy Co. at the time the bids were made, and he lived in the same city of Chicago where these two competing bidders had their respective factories. He was perfectly competent to testify on this point, and the Court below made no error in the admission of the testimony.

8. Further complaint is made that Gordon was permitted to testify as to the usual or average percentage of profit customarily realized by manufacturers of articles similar to the No. 2 Standard Washer.

(*a*) It cannot for a moment be urged that such testimony, emanating from a person qualified to speak, would be incompetent. The provisions of the contract were peculiar. The case had previously been heard, and on motion for a new trial, had gone before the Circuit Judge who did not sit at the jury trial. In delivering his opinion the Circuit Judge said:

> "As to the damages recoverable for the breach of that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other washing machines at the lowest price bid by other manufacturers for supplying defendant with same, it is not clear that the plaintiff could establish any loss of profits unless it could be shown that there is some usual or average percentage of profit customarily realized by manufacturers of analogous articles or some established manufacturer's price." (See page 59 of the record.)

The testimony was offered to meet the requirements of the law as thus expressed, and was entirely competent for the purpose.

(*b*) The only real objection must be as to Gordon's qualification to speak on this point. The objection is to the person, and not to the subject matter.

Let us see. Before the Court permitted the witness to testify, he was thoroughly examined and cross-examined by opposite counsel. He stated that he was in the business of selling laundry machinery and had been so engaged about nine years; that from 1882 to 1885 he was the Chicago manager of the Troy Laundry Machinery Co.; that he had experience as a manufacturer of laundry machines with the No. 2 washer prior to his connection with the Troy Co; that such experience was with J. M. Munger & Co., who commenced making machines in 1877; that he superintended the construction of them in the factory, and continued with Munger until March 1, 1881; that he had been connected with the A. M. Dolph Co. since April 15, 1885, and held official position as one of the directors of that Company; that he had been in the factory, heard official reports, and knew the cost of laundry machines.

After being thus specially examined and qualified, Gordon was permitted by the Court to answer. The question, whether a witness is qualified to express an opinion in cases similar to this, is always one to be determined by the trial court, after full cross-examination. The discretion of the trial Judge, in such cases, is very wide, and his action will not be disturbed unless there has been a clear abuse of the judicial discretion. There was no such abuse in this case. In some cases the experience of the witness is greater, and in others less; but, after more than ten years' experience in the manufacture of laundry ma-

chinery, and in the selling thereof, Gordon was certainly qualified to express an opinion, which was all that was asked. That opinion could carry only such weight with the jury as it derived from his character and his experience. An older person might give more weight to his statement, and a more experienced person could speak from a wider range of observation, but Gordon was entitled to speak, and there is nothing to show that any undue weight was attached to his testimony. His qualification having been properly determined by the Court, the weight of the testimony was then for the consideration of the jury.

9. The same remarks apply to the ninth alleged error. It is true that Dolph had been a manufacturer for a longer period and possibly could speak with more authority, but the weight of the testimony was solely for the jury.

THIRD.

Measure of Damages.

1. In the tenth assignment, complaint is made that the Court did not direct a verdict for nominal damages only.

(*a*) The principal point made under this assignment is that the contract was an illegal combination in restraint of trade, and this we have fully considered in the first division of our argument, and do not wish to add anything further.

(*b*) The other points stated under the request for nominal damages are questions as to the weight of the testimony, and are not for the consideration of this Court upon a review of the points of law.

2. Complaint is made as to a certain portion of the charge of the Court to the jury in regard to the profits made by the defendant in the year 1882. What the Court actually said on this subject was this: (See page 47 of the record.)

"There are, however, some general rules applicable to all cases when a contract has been violated to which it is proper to call your attention in the first instance."

"Ordinarily the injured party is entitled to recover as damages what he would have realized had the contract been kept. He will be compensated when he has recovered the value of his bargain. The loss of profits is a common measure of damages. What the plaintiff would have made in the future had he been permitted to perform the agreement should be taken into consideration by the jury; and in estimating prospective profits, not as affording an absolute rule or measure of damages but as a guide, as evidence to be considered by them in fixing the amount of future profits. It is by no means conclusive evidence, but it is pertinent to go to the jury in connection with the other facts and circumstances of the case. In this case the profits made by the plaintiff and paid him by the defendant for the year 1882 were $2,071. In all cases the damages should be shown by clear and satisfactory proof; they should not be left to speculation and conjecture. The jury is not permitted to indulge in guess-work upon this question. Profits which the plaintiff would certainly have made but for the defendant's unauthorized action are recoverable, but those which are hypothetical and consequential in character cannot be recovered; they are too remote."

There is no error in this statement of the law.

3. Complaint is made that the Court submitted to the jury the question of damages on other breaches of the contract.

It is perfectly clear that the plaintiff was entitled to recover damages upon any provision of the contract which had been willfully violated by the defendant, and was not limited in his recovery to damages arising under any particular clause. This point requires no argument.

"Whatever rule may be adopted in calculating the damages to a contract or where, without his fault, the other party during its progress puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject matter of the contract."

"The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration."

Behan vs. U. S., 18 Court of Claims, 687, 699.
Same case affirmed, 110 U. S., 338.

4. It is alleged that the Court erred in charging the jury that they might presume that the parties would have altered the seller's price of the machines by mutual consent, and that they might award damages on the basis of such supposititious agreement.

The Court gave no such instruction to the jury. What the Court did say, was this (see page 51 of the record) :

"But the contract provides for the reduction of prices, showing that that contingency was in the minds of the parties when the agreement was made. It has been proved that the price of manufacture decreased from $92.50 to $46.60, and that the average market price gradually decreased from $200 down to as low as $99 in 1886. You have, therefore, a right to conclude that had the contract remained in force the competition would have been such that the parties would have lost the chance to sell any machines at all had they adhered to the stipulated price of two hundred dollars, or, what is more probable, that they would have done what common-sense and self-interest dictated—reduced the prices to meet the demands of the market. In either event, of course, the profits would have been much reduced on each machine. It would be unfair to charge the

defendant with the profit stipulated in the contract on the machines sold, when the proof makes it quite clear that they could have sold none of the machines which they did sell after 1882 unless they had largely reduced the price. At least, it is for you to say, in view of the falling market, whether they could have maintained the selling price at $200."

The defendant below was not prejudiced, and could not have been, by such a fair statement of the law applicable to the evidence in this case.

5. The defendant below was not entitled to the specific charge set forth in his first request; the Court had already charged upon that point (see page 50 of the record), and could not be required to repeat the charge in special language prepared by counsel.

6. There was no error in the Court's refusal to charge the defendant's second request. This subject had been included in the general charge, and there was nothing in the evidence to require a special charge.

7. There was no error in the Court's refusal to give the defendant's third request. There was evidence in the case tending to prove that the plaintiff would have suffered damage by reason of the failure of the defendant to order machines from him, and this presented a question of fact which was solely within the province of the jury.

8. It is alleged that the Court erred in refusing to give the seventh request, as found on page 52 of the record. It is sufficient to say that there was no evidence requiring such instruction from the Court, and the charge was properly refused. If any such question arose at all, it would be simply one of probabilities upon the facts proven, and this was exclusively a question for the jury.

9. The record does not show that the Court refused to give the defendant's ninth request, as found on page 52 of the record. The Court below, on this point, simply said to the jury: "I have already said that that was a question for you to determine."

10. Again, on this point, the defendant below could not dictate to the Court the precise form of words in which the charge to the jury should be given. This point had been covered by the general charge, so far as the testimony required any instruction to the jury from the Court. The charge requested was erroneous in form, and, had it been given, would have been much more likely to mislead than to enlighten the jury.

11. There was no error in refusing to charge the thirteenth request. There was no testimony upon which such a charge could properly be based. The general charge had covered all that was necessary on this point, and the remarks above made apply to this assignment.

12. There was no error in refusing to charge according to the 15th request. The charge of the Court upon the entire subject of damages was clear, full and comprehensive, the rights of the defendant below were carefully guarded, and the jury were cautioned at every point, so that no unwarranted or excessive damages should be given. The special request of the defendant, on the other hand, was complicated, vague and obscure; its meaning would not have been understood by the average juryman, and the giving of such a charge would have been of no benefit to the defendant, and could have served no useful purpose in the case. The courts have so frequently

passed upon questions of this character that it is not necessary to cite authorities.

To show that the whole charge of the Court below was correct in law, and that it was fully sustained by the authorities, we cite a few cases on the subject:

"The fact that the profits to be derived from a contract are very large, is no reason why they should not be recovered. But when the contract is established . . it is entitled to all the legal consequences and incidents of a valid contract.

Mr. Justice Bradley, in Hitchcock v. *City of Galveston*, 3 Woods, 287.

"The party prevented is entitled to recover all damages, including gains prevented as well as losses sustained, . . .

"They must be such as might naturally be expected to follow from a violation of the contract."

Griffin v. *Colver*, 16 N. Y., 489.
Masterton v. *Mayor of Brooklyn*, 7 Hill, 61.
Phil. Wil. & Bal. R. Co., v. *Howard*, 13 Howard, 307, affirming 7 Hill.

"The true criterion whether in an action on contract, one can recover damages for the non-performance of the whole contract, and thus recover damages not sustained when the action is brought or tried, is whether there has been such a breach of contract as the plaintiff is authorized to consider as entirely putting an end to the contract."

"It could not be held as a matter of law that the breach of this contract was not such an entire one as entitled the plaintiff to recover damages beyond what he had sustained at the time of the arbitration, but that it was a question of fact, &c., and therefore the award ought not to be held invalid because prospective damages were awarded thereby."

Remlee vs. Hall, 31 Vermont, 582,
Sedgwick on Measure of Dam., 5th Ed., page 117.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may

fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it."

Hadley vs. Boxendale, 9 Exch. 354.

"Actual damages include the direct and actual loss which a party sustains when hindered or prevented from completing his contract."

"The loss sustained includes the loss of profits which would have been realized as the immediate and necessary result of the fulfillment of the contract."

"Such profits growing out of the contract itself as one of its direct and legitimate fruits, constitute a just and proper element of damage against the party whose breach of the contract has prevented such profits from being realized. To deny them would be to give the delinquent party the benefit and advantage of his own wrong."

Wisner vs. Barber, 10 Oregon, 342.

"The rule in awarding damages in such a case for a breach of contract is to make the plaintiff as nearly whole as he can be made in money damages; or, in other words, to leave him as nearly as possible as well off as he would have been if defendant had performed his contract; and he is entitled to recover the actual profit he would have made had the contract been performed."

Pittsburgh Steel Rail Co. vs. Hinckley, 17 Fed. Rep. 585.

The case was carried to the Supreme Court of the United States, and the opinion of this Court affirming the decision below, is reported in

121 *U. S.* 264.

Mr. Justice Blatchford delivered the opinion, and, among other things, said: "These considerations also show that the rule of damages adopted by the Circuit Court was the proper one."

The entire opinion fully sustains the charge to the jury of the Court below in the case at bar.

The contract between Dolph and the Troy Laundry Co. contains some provisions which are rather unusual in contracts of this character, and both of the learned judges in the Court below recognized the difficulty of stating an exact rule of law which would be applicable to the contract. They also recognized the fact that all the circumstances and items relating to the case should go to the jury, in connection with the charge of the Court, to enable it to form a proper conclusion to be embodied in its verdict. In a Michigan case, a somewhat complicated question of damages came before the Courts for consideration and decision, and was carried to the court of last resort in that State, at a time when its bench was adorned by the presence and erudition of some of the most distinguished jurists of the country. The opinion is so elaborate and so carefully considered, that it is well worth a thorough examination. It is the case of *Gilbert* v. *Kennedy*, 22 Mich. 117.

"We shall endeavor to ascertain the principle which should govern in respect to damages, and to determine how far those principles have been observed.

"The damages to be awarded should be such as *adequately* to compensate the actual loss or injury sustained. This is an obvious principle of justice from which we see no reason to depart. But in the application of the principle, difficulties often arise in ascertaining, with anything like accuracy, the actual damages which the plaintiff has suffered from the injury; or what sum will produce adequate compensation."

"Some cases are such in their nature and circumstance,e as to furnish an obvious rule by which a just and adequats compensation can be readily and accurately measured; and whenever, and so far as this is the case, such rule should be

applied in actions of tort as well as in those upon contracts, as we held in *Allison* v. *Chandler*, 11 Mich. 542, and in *Warren* v. *Cole*, 15 Mich. 274."

"But such is the almost infinite variety of circumstances under which torts may be committed, that cases will often occur in which, 1st. No reliable data, no element of certainty can be found by which to measure with accuracy the actual amount of the damages, though it is evident to the Court and jury that large damages have resulted from the injury; and, 2d. Cases in which there will be elements of certainty as to a part only of such damages, leaving it certain that the actual damages must be largely beyond what can be thus accurately measured. Now, in the first class of cases, are the jury to give merely nominal, or what is the same thing, *no* damages, and is the injured party to obtain no redress, because the case happens to be one which does not furnish a rule for their accurate measurement? And in the second class of cases is he only to recover so much as can be measured with certainty, though it may be *equally certain* that this does not cover the tithe of the damages really sustained? This might be well enough if the want of certainty inherent in the nature of the case were properly attributable to the fault of the plaintiff. But *he* did not make the case; this was made against his will by the defendant, who chose his own time, place and manner of committing the wrong, and the plaintiff is compelled to grapple with the case thus made for him; and therefore such a rule, as one of universal application, can only become just when trespassers become so considerate of the rights of others as to commit their trespasses only in cases and under circumstances where the damages can be calculated by a fixed and certain rule. To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result."

"There can be no rule of law founded upon any just or intelligible principle, which, in actions of trespass at least, requires any higher degree of certainty in the evidence upon which the damages are to be estimated, than in reference to any other branch of the cause. Juries in such cases have as much right, and it is as clearly their duty to draw reasonable and probable

inferences from the facts and circumstances in evidence, in reference to the amount of damages, as in reference to any other subject of inquiry in the case. And in those cases of trespass, or those features of a particular case, where, from the nature of the case, adequate damages cannot be measured with certainty by a fixed rule, all the facts and circumstances tending to show such damages as are claimed in the declaration, or their probable amount, should be submitted to the jury to enable them to form, under proper instructions from the court, such reasonable and probable estimate, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract for throwing *any part* of the loss upon the injured party, which the jury believe from the evidence he has sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. And the adoption of any arbitrary rule in such a case, which will relieve the wrong-doer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery."

"Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of uncertainty thus produced; and this not only when the trespass is wilful and wanton, without a claim of right, but whenever the property, though claimed by him, is in the possession of another, and he, taking the law into his own hands, makes himself judge in his own cause, and, knowing his right to be disputed, seizes upon the property without a judicial trial of his rights."

It is true that the Michigan case arose upon a tort, while the case at bar is upon a contract. We do not claim that all the minute statements of the learned jurist in that case are applicable here. But we do insist that the reasoning has great force, and it is a complete answer to the objections made in the assignment of errors now presented, upon the whole question of the admission of testimony as to damages other than

those resulting from the failure of the Troy Co. to take fifty No. 2 Washers per annum, and also upon the other question of the proper measure of damages to be applied: We quote further:

"There being no other element of certainty by which the damages can be *accurately* measured, resort must be had to such principle or basis of calculation applicable to the circumstances of the case (if any be discoverable) as will be most likely to *approximate* certainty, and which may serve as *a guide* in making the most probable estimate of which the nature of the case will admit; and, though it may be less certain as a scale of measurement, yet if the principle be just in itself, and more likely to approximate the *actual damages*, it is better than any rule, however certain, which must certainly produce injustice, by excluding a large portion of the damages actually sustained."

FOURTH.

We may show by illustration, in figures, that the charge of the Court had the effect of making the jury extremely conservative in estimating the damages which the Troy Co. should pay.

We take the number of machines sold by A. M. Dolph in the years 1883, 1884, 1885 and 1886, and the prices at which they were sold, from Dolph's testimony, found on pages 19 and 20 of the record. The cost to Dolph of the manufacture of these machines is found in the same part of the testimony.

The number of machines sold, and the prices at which they were sold by the Troy Co., during the same period of four years, is shown in the statements furnished by Charles Angus, Secretary, in the supplement annexed to the record.

The prices decreased from year to year, and the sales increased from year to year. With the above mentioned state-

ments in mind, and with the written contract between the parties as a foundation, it is evident that there would be two distinct items of damage sustained by Dolph, viz:

1. The profit on joint sales.
2. The manufacturer's profit.

First—The selling price in each year is shown by the testimony. By article four of the contract the manufacturer's price was in the proportion of 110 to 200, and thus was 11-20 of the selling price. The difference between these two was 9-20 of the selling price, and this represented Dolph's profit as a dealer on machines actually sold by him, for which he must account to the Troy Co. at the end of the year. The same figures represented the profit on the machines sold by the Troy Co., for which it must account to Dolph at the end of the year. The balance due one party or the other would be determined by computing one-half of this profit upon the excess of sales made by the larger vendor.

Second—Dolph was entitled to recover his manufacturer's profit. This item of profit on each machine furnished by him to the Troy Co. was the difference between the actual cost to Dolph and the "manufacturer's price" for each year, as fixed by the contract, viz.—11-20 of the average selling price for the current year. The aggregate amount of Dolph's manufacturer's profit for each year would be shown by multiplying this "manufacturer's price" by the number of machines sold by the Troy Co. in that year. The computation must of course be limited to such machines as were contemplated by the contract.

The sum of the first and second items would show the total damages recoverable by Dolph.

The following computation shows this interpretation of the contract applied to the testimony.

COMPUTATION.

Damages Sustained by A. M. Dolph in the Year 1883.

The Troy Co. in 1883 sold seventy machines in excess of the number sold by Dolph.

The actual selling price in 1883 was - - -	$ 150 00
The manufacturer's price, 11-20, was - -	82 50
Dealer's profit on each machine was - - -	$67 50
One-half to each party was - - - - -	33 75
Dolph was entitled to $33.75 on seventy machines. This would be - - - - - - -	$2362 50
The manufacturer's profit in 1883 was $22.50	
Dolph was also entitled to this manufacturer's profit on the whole number of machines which the Troy Co. sold in 1883, and which they should have taken from him, viz.—121.	
121 machines at $22.50 would be - - - -	$2722 50
Dolph's total damages in 1883 - - - -	$5085 00

Damages Sustained in 1884.

The actual selling price was - - - -		$ 125 00
The manufacturer's price, 11-20, was - -		68 75
Dealer's profit on each machine was - -		$56 25
One-half to each party was - - -		28 12½
Sales of Troy Co. in excess of Dolph, 229.		
229 machines at $28.12½ would be - -		$6440 00
The manufacturer's price in 1884 was	$68 75	
Actual cost to Dolph was - -	50 00	
Dolph's profit on each machine was	$18 75	
Troy Co. sold in 1884, 283 machines.		
283 machines at $18.75 would be - -		$5307 00
Dolph's total damages in 1884 - - -		$11747 00

Damages Sustained in 1885.

The actual selling price was - - - -		$ 115 00
The manufacturer's price, 11-20, was - -		63 25
Dealer's profit on each machine was - - -		$51 75
One.half to each party was - - - -		25 87
Sales of Troy Co. in excess of Dolph, 213.		
213 machines at $25.87 would be - - -		$5510 00
The manufacturer's price in 1885 was	$63 25	
Actual cost to Dolph was - - -	45 00	
Dolph's profit on each machine was	$18 25	
Troy Co. sold in 1885, 311 machines.		
311 machines at $18.25 would be - - -		$5675 00
Dolph's total damages in 1885, - - -		$11,185 00

The computation for 1886 would show about the same amount— - - - - - - - $11,185 00

In addition to the above there were sold by the Troy Co. 15 Dash Wheel Machines. The cost to Dolph of manufacturing these was from $125 to $175, according to size.

The average cost was - - -	$150 00
They were sold by Troy Co. at -	260 00
One-half net profit on each machine,	55 00
15 dash wheels at $55 would be -	$825 00

SUMMARY.

Damages sustained in 1883, - -	$ 5,085 00	
" " " 1884, -	11,747 00	
" " " 1885, - -	11,185 00	
" " " 1886, -	11,185 00	
" on dash wheels, - -	825 00	
Total damages sustained by Dolph,		$40,027 00
Damages as allowed by jury, - - - -		7,208 00
Actual damages in excess of allowance by jury,		$32,819 00

This computation shows how baseless is the pretense that any excessive damages were allowed in this case. As a matter of fact, Dolph was only allowed a little more than one-sixth of the amount to which he was entitled. The Troy Co. was not prejudiced by the ruling, or the charge of the Court, but was protected and shielded at every point. This company was a

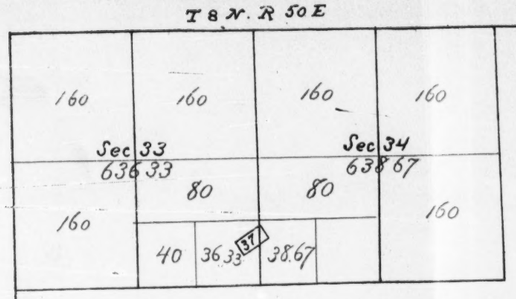
wrong-doer in letter and in spirit. It had tied up Dolph in a five years' contract; had devoted itself to securing the market for its wares, while Dolph was hampered and restrained by his duties as a manufacturer. It continued the contract just long enough to over reach Dolph by securing its strong hold upon the market, and then it not only broke its contract, but repudiated it openly, willfully, boldly. When summoned into court to make reparation, it brought no witnesses, and offered no testimony to justify its wrong, or to mitigate the damages. It stood silent, sullen, defiant. A breach of contract, under such circumstances, is nearly akin to a tort, and should be treated accordingly. *Gilbert* v. *Kennedy*, 22 Mich., 117.

The defendant below was entitled to justice, impartial, exact, severe. Instead of this, it had from the Court, at every point, clemency, and at the hands of the jury, mercy. It presents a curious spectacle when a defendant, who has been required to pay about one-sixth part of the damages he has wilfully caused, comes into an Appellate Court asking for relief on the ground of excessive damages.

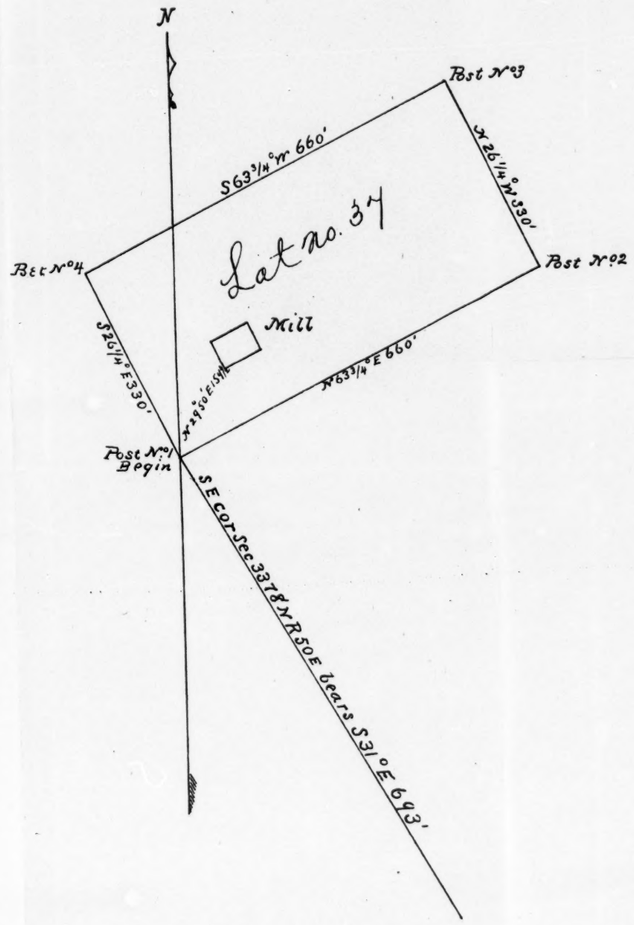
We respectfully ask for an affirmance of the judgment below.

H. P. LLOYD,

Counsel for Defendant in Error.



No. 154.
Williams
vs
U. States.
} p 309.



(Copy)

Survey No. 37

PLAT

of the Claim of

E.O. Matthiessen and L.B. Ward

upon the

New Philadelphia

Millsite

Hot Creek Mining District

Nye County Nevada

Containing an Area of 5.00 Acres

Scale of 200 feet to an inch

Variation 16°30' E

Surveyed by G. Ernst

U.S. Deputy Min. Surveyor

December 16th 1882

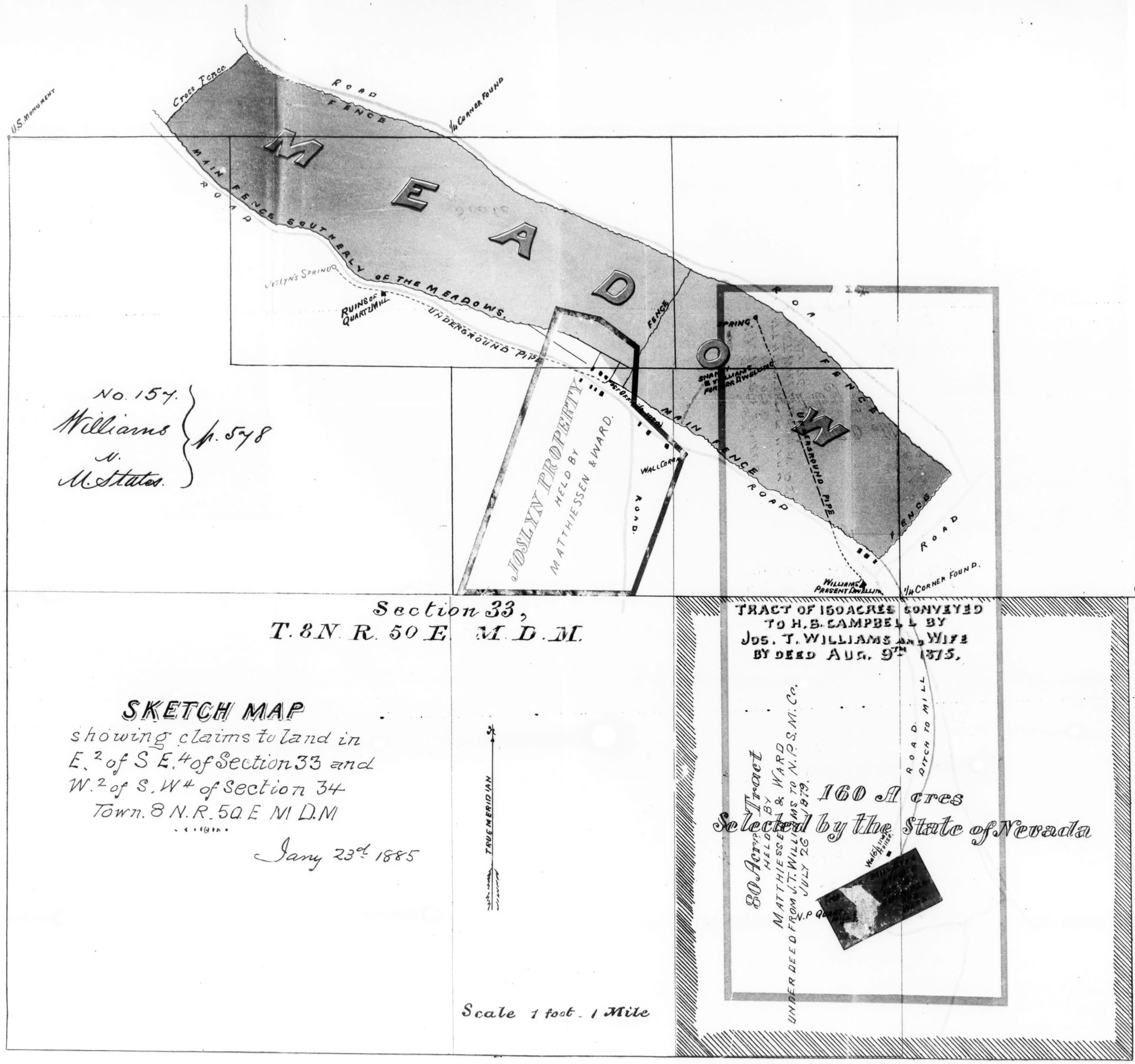
The original field notes of the Survey of the claim of F O Matthiessen & L B Ward upon the New Philadelphia Millsite from which this plat has been made have been examined and approved and are on file in this Office, and I hereby certify that they furnish such an accurate description of said Millsite claim as will if incorporated into a patent serve fully to identify the premises and that such reference is made therein to natural objects and permanent Monuments as will perpetuate and fix the locus thereof. I further certify that the value of the labor and improvements placed thereon by the applicants or their grantors is not less than Five Hundred Dollars and that said improvements consist of a Steam Quartz Mill, as appears by the report of the Deputy Surveyor and the testimony of two disinterested witnesses. and I further certify that this is a correct plat of said Millsite Claim made in conformity with said original field notes of this survey thereof

U S Surveyor Generals Office
Reno Nev
December 26th 1882

G S Davis
U.S. Surveyor General
for Nevada

Endorsed: Enclosure 3 of Plaintiffs Exhibit D"
Filed Nov. 1. 1886 T J Edwards clerk.

309



No. 157.
Williams
v.
U. States.
} No. 578

SKETCH MAP
showing claims to land in
E.½ of S.E.¼ of Section 33 and
W.½ of S.W¼ of Section 34
Town. 8 N. R. 50 E. M. D. M.

Jany 23d 1885

Scale 1 foot - 1 Mile

Reffs Ex et
(dig) T. J. Edwards
Commissioner

J. M. Hill

Contestee's Rebuttal
Exhibit No 4

Copy

650a

T. N.

R. E. Gould

No. 157.
Williams
v.
U.States.
} p. 650a

Section Corner

Section Corner

1/4 Corner

FENCE 1857

FENCE 1857

FENCE 1867

FENCE 1867

FENCE 1867

HAY CORRAL 1875

Spring

Spring

Open Cut Spring & Frame House moved off 1869

The old Gould millsite

ROAD

LINE OF WATER RIGHTS

PLOWED LAND

PLOWED LAND

North line of Campbell Deed Aug 9th 1875

Williams Dwelling 1882

Lower Town Hot Creek

WALL OX CORRAL

Williams Stone & Adobe Stable 1874

Corral

Frame Stable

Dwelling 1882 - 85 Williams

Stone House 1874

1/4 Corner

ROAD

West line Campbell Deed Aug 9th 1875

ROAD

Line of Campbell Deed Aug 9th 1875

South line of Campbell Deed Aug 9th 1875

33

M E A D O W

A R R O Y O L A N D

A R A B L E L A N D

Section 33 T. 8 N. R. 50 E. M. D. M.
By G. Ernst

Scale 1-inch 400 feet

Complainants Exibit T.
J. J. Edwards
Conv

Filed Nov 1. 1886
J. J. Edwards
Clerk

Copy. 651

Exhibit #16
Transcript of Evidence
Court

No. 157.
Williams,
v.
U States.
} p. 651

Section Line

Section

U.S. Monument

Cross Fence

ROAD

MAIN FENCE

NW Corner Found

Section Line

MEADOW

J. T. WILLIAMS' HOME-STEAD

MAIN FENCE ROAD

SOUTHERLY OF MEADOW

SPRING

RUINS OF SMALL QUARTZ MILL.

NORTHERLY OF THE MEADOW

WELL

FENCE

H. B. CAMPBELL

H. B. CAMPBELL BY DEED

SPRING

ROAD

LOWER

POST OFFICE & STORE

WILLIAMS HOUSE AUG 9th 1875.

FOUND

JOSLYN PROPERTY

APPLICATION

WALL CORRAL

ROAD

160 ACRES CONVEYED

W

FENCE

ROAD

E side of Meadow Land

STONE HOUSE

1/4 CORNER FOUND

JOS. T. WILLIAMS AND WIFE BY DEED AUG 9TH 1875.

Section 33

Section 34.

BOUNDARY LINE OF TRACT OF 80 ACRE TRACT

EAST HALF OF SOUTH EAST QUARTER OF SECTION 33 CONVEYED TO N.P.S.M.Co. BY JOS. T. WILLIAMS JULY 26TH 1879.

DITCH TO MILL

ROAD

160 ACRES
Selected by the State of Nevada
Sept 2nd 1882.

FIVE ACRE MILL SITE SURVEY No 37

QUARTZ MILL

APPLIED FOR JAN 6th 1883

Line of Road

Mc Bean Lane

ROAD

TRUE MERIDIAN

Scale 80 chains = 1 foot

Section Line

Line

Filed Nov. 1. 1886
G. J. Edwards
Clerk

No. 13.
Williams
vs
Wates
} p. 817.